TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 194.

EXTEIN NORTON, PLAINTIFF IN ERROR,

vs.

SHELBY COUNTY, STATE OF TENNESSEE.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TENNESSEE.

FILED FEBRUARY 22, 1883.

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1 United States of America, ———Division of the Western District of Tennessee.

In the Circuit Court of the United States within and for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit thereof.

Proceedings had in said court, at a regular term thereof, begun and held for its ——— term, A. D. 188–, at the United States court-house in the city of Memphis, in said district, on, to wit, the — day of ——, A. D. 188–, in the following cause, to wit:

EXTEIN NORTON, Plaintiff,
vs.
SHELBY COUNTY, Defendant. } No. 2637.

2 In the Circuit Court of the United States for the Western District of Tennessee, at Memphis.

ECKSTEIN NORTON
vs.
THE COUNTY OF SHELBY. } 2637.

Eckstein Norton, a citizen of the State of New York, sues the County of Shelby, a corporation having its *situs* in the western district of Tennessee, and created and existing under the laws and constitution of the State of Tennessee, and which county is in court by the summons of a plea that said county render unto the plaintiff the sum of fifty thousand dollars, which to him it owes, and from him unjustly detains, to his damage fifty thousand dollars, for that whereas, heretofore, to wit, on the 1st day of March, 1869, the said defendant, Shelby County, in pursuance of lawful authority to it granted for that purpose, made, executed, and delivered amongst others its (29) twenty-nine bonds for ($1,000) one thousand dollars each, all dated 1st day of March, 1869, and due and payable on the 1st day of January, 1875.

Such bonds being numbered respectively as follows: No. 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 263, 264, and
3 265. Also upon its three coupons for $60 each, all dated as of the same date as said bonds, and due at same date as the bonds above referred to, such coupons being from bonds 263, 264, and 265, such bonds and coupons, with interest thereon from their respective maturities, remain due and unpaid, and the same are made profert of, and are here to the court shown. Defendant, although often requested, still refuses to pay such bonds and interest; wherefore he brings this suit.

HUMES & POSTON,
Attorneys for Plaintiff.

Filed Oct. 27, 1880.

BELL W. ETHERIDGE, *Clerk*,
By W. B. WEISIGER, *D. C.*

1—194

4 In the Circuit Court of the United States for the Western District of Tennessee, at Memphis.

EX. NORTON
vs.
SHELBY COUNTY. } No. 2637, Law Docket.

The President of the United States of America to the marshal of the western district of Tennessee, Greeting:

You are hereby commanded to summon Shelby County, citizen of the State of Tennessee, if to be found within your district, to appear before the judge of the circuit court of the United States, in the sixth circuit, for the western district of Tennessee, at Memphis, in said district, on the 4th Monday in May next, and then and there to answer Ex. Norton, citizen of the State of New York, in a plea of debt, to the damages of the said plaintiffs (as they say) of fifty thousand (50,000.00) dollars. Herein fail not, and have you then and there this writ.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, and the seal of said circuit court, at Memphis, Tenn., this 27th day of October, A. D. 1880, and the 105th of American Independence.

[SEAL.] BELL W. ETHERIDGE, *Clerk.*
W. B. WEISIGER, *D. C.*

5 Know all men by these presents that we, Ex. Norton and Humes and Poston, sureties—held and firmly bound unto said defendant, Shelby County, in the sum of two hundred and fifty dollars; but to be void on condition that the said defendant, Shelby County, do pay and satisfy all costs that may accrue in that behalf in the prosecution of the said suit this day commenced by the said plaintiff in the circuit court of the United States for the western district of Tennessee, at said Memphis, against the said defendant; and also on failure of the said plaintiff to prosecute the said suit with effect; and also on failure of the said defendant, if convicted, to pay costs.

Witness our hands and seals, this 27th day of October, A. D. 1880.

EX. NORTON, [SEAL.]
HUMES & POSTON, *Sureties.* [SEAL.]
Per HUMES & POSTON, *Att'ys.*

Approved and acknowledged before me on the 27th day of October, A. D. 1880.

BELL W. ETHERIDGE, *Clerk.*
W. B. WEISIGER, *D. C.*

Received by the marshal on first day December, 1880.

I received this summons, together with the declaration herein, from the clerk on the first day Dec., 1880, and on the 6th day of December, 1880, I executed same on the within-named Shelby

County, Tenn., by serving certified copy hereof, together with certified copy of declaration herein, personally on Tom Holman, Jr., as chairman of the county court of Shelby County, Tenn.

6 And on third day Jan'y, 1881, I further served certified copy of summons in this cause, personally, upon J. A. Taylor, as attorney for the County of Shelby, Tenn.

M. T. WILLIAMSON,
U. S. Marshal.
By A. J. GARDNER, *Dep.*

2 serv. sum	$4 00
1 serv. Dec.	2 00
3 M.-	0 18
	$6 18

Returned and filed Jan'y 6, A. D. 1881.

BELL W. ETHERIDGE, *Clerk.*
W. B. WEISIGER, *D. C.*

7 In the Circuit Court of the United States for the Western District of Tennessee.

EXTEIN NORTON
vs.
SHELBY COUNTY. } No. 2637.

The defendant comes and craves oyer of the bonds and coupons sued on herein, and mentioned in plaintiff's declaration.

W. B. GLISSON,
Attorney for Defendant.

Filed Feb. 10, 1882.

BELL W. ETHERIDGE, *Clerk,*
By W. B. WEISIGER, *D. C.*

8 In the Circuit Court of the United States for the Western District of Tennessee.

EXTEIN NORTON
vs.
SHELBY COUNTY. } No. 2637.

The defendant craves oyer of the bonds and coupons here sued on and mentioned in plaintiff's declaration, and plaintiff bringing said bonds and coupons into court, and which are read to defendant in words and figures as follows, to wit:

$1,000 UNITED STATES OF AMERICA, $1,000

Issued under and by virtue of section 6 of an act of the Legislature of the State of Tennessee, passed February 25th, 1867, amended on the 12th day of February, 1869, and by authority conferred upon the county commissioners of Shelby County by section 25 of an act passed March 9th, 1867.

State of Tennessee.

(Vignette.)

A special tax is levied by authority of law upon all the taxable property in the County of Shelby, to meet the principal and interest of these bonds, collectible in equal annual installments running through six years, as the bonds themselves mature.

Shelby County Railroad Bond No. 176.

Be it known that the County of Shelby, State of Tennessee, is indebted to the Mississippi River Railroad Company or bearer in the sum of one thousand dollars, payable in the city of Memphis on the first day of January, eighteen hundred and seventy-three, with interest at the rate of six per cent. per annum from January 1, 1869, payable annually in said city upon surrender of the matured interest coupons hereto attached.

1,000 dollars.

This is one of three ($1,000) hundred bonds, all of the same denomination and rate of interest, issued by Shelby County in payment of a subscription of three hundred thousand dollars to the Mississippi River Railroad Company, made by the county commissioners under the authority of the acts above recited, transferable by delivery and redeemable in six years, at the rate of fifty thousand dollars a year, commencing January 1, 1870.

9 Dated at the city of Memphis, County of Shelby, State of Tennessee, the first day of March, 1869.

[Seal County Court of Shelby County, Tenn.]

BARBOUR LEWIS,
President of the Board of County Commissioners of Shelby County.

JNO. LOAGUE,
Clerk of County Court of Shelby County.

(On back of bond is:)

STATE OF TENNESSEE:

Shelby County Railroad Bond No. 176.

$1,000.

Issued to Mississippi River Railroad Company, payable January 1, 1873, interest at six per cent., payable annually, January 1, in each year.

I certify that the foregoing is a full and complete copy of the wording of said bond this day made by me.

March 6, 1882.

[SEAL.]

F. P. POSTON,
Notary Public.

$60 STATE OF TENNESSEE, $60

Shelby County.

Coupon No.—— of Bond No. 264.

The trustee of Shelby County will pay to the bearer sixty dollars in the city of Memphis on the 1st day of January, 1875, being interest due on bond No. 264, for $1,000, of bonds issued to Mississippi River Railroad Company.

[Seal County Court of Shelby County, Tenn.]

(Signed) JOHN LOAGUE,
Clerk of Shelby County Court.

True copy. D. H. POSTON.
W. B. GLISSON.

10 This defendant, not confessing any of the matters or things alleged in plaintiff's declaration, or appearing on the face of said bonds and coupons, but denying, etc., doth demur thereto for variance, and for cause of demurrer says:

1. That said declaration on its face alleges that "on the first day of March, 1869, the said defendant, Shelby County, in pursuance of lawful authority to it granted for that purpose, made, executed, and delivered, amongst others," etc., the said bonds and coupons here sued on, whereas said bonds and coupons show upon their face that they were made and executed by Barbour Lewis, president of the board of county commissioners of Shelby County—a person assuming to hold an office and exercise an authority unknown to the laws of Tennessee, and in open violation of law—and that he was not authorized or empowered to bind this defendant in law.

2. Because that said declaration alleges on its face that defendant, as aforesaid, in pursuance of lawful authority to it granted for that purpose, made, executed, and delivered, etc., the bonds here sued on. Whereas said bonds show upon their face that they were issued in payment of a subscription of three hundred thousand dollars, made to the Mississippi River Railroad Company by the county commissioners—a body unknown to the laws of Tennessee, and unauthorized to make said subscription for and in the name of Shelby County, or to in any way lawfully bind defendant—and that said bonds, made to pay said unlawful subscription, were issued by Barbour Lewis, president of the board of county commissioners, who was unknown to the laws of Tennessee, and were made in open violation of the laws.

11 3. Because said declaration alleges on its face that on the first day of March, 1869, the said defendant, Shelby County, in pursuance of lawful authority to it granted for that purpose, "made, executed, and delivered, amongst others, etc.," the said bonds and coupons here sued on.

Whereas said bonds show upon their face that they were issued by Barbour Lewis, president of the board of county commissioners of Shelby County, and were issued in payment of a subscription made by the county commissioners, and were "issued under and by virtue

of section 6, of an act of the Legislature of Tennessee, passed February 25th, 1867, amended on the 12th day of February, 1869, and by authority conferred upon the county commissioners of Shelby County, by section 25 of an act passed March 9th, 1867," and said acts, being referred to in the face of said bonds, became, and are, a part thereof; and therefore, said bonds, by said acts referred to, show upon their face that they were issued, made, and executed by Barbour Lewis, president, etc., without any lawful authority, but contrary to law, and that this defendant was not, and is not, bound in law, and that plaintiff cannot sue thereon.

Wherefore defendant prays that this suit be dismissed at plaintiff's costs, etc.

W. B. GLISSON,
Attorney for Defendant.
G. P. M. TURNER,
Attorney General, for Defendant.

Filed March 24, 1882.

BELL W. ETHERIDGE, *Clerk*,
By W. B. WEISIGER, *D. C.*

12 In the Circuit Court of the United States for the Western District of Tennessee.

EXTEIN NORTON
vs.
SHELBY COUNTY. } 2637.

This cause coming on to be heard on demurrer of defendant to plaintiff's declaration, and the same having been heard and considered by the court, and the court being of the opinion that the questions of want of authority to issue said bonds can only be raised by plea of *non est factum*, sworn to under the statute, the several causes of demurrer are for that reason overruled.

Entered March 27, 1882.

13 In the Circuit Court of the United States for the Western District of Tennessee.

EXTEIN NORTON *vs.* SHELBY COUNTY.

1. The defendant, for plea, says that the bonds and coupons upon which plaintiff's action is founded were not made, executed, or delivered by it or by any one lawfully authorized to bind it in the premises.

2. And for further plea defendant says that the bonds and coupons upon which plaintiff's action is founded were made and executed by Barbour Lewis, as president of the board of county commissioners of Shelby County, a person assuming to hold an office which did not exist by the laws of Tennessee, and that said Barbour Lewis, as such assumed officer, had no lawful right, power, or authority to make, execute, and deliver said bonds and coupons and thereby bind it in the premises.

3. And for further plea defendant says that the bonds and coupons upon which plaintiff's action is founded were issued, made, executed, and delivered by Barbour Lewis, as president of the board of county commissioners of Shelby County, in payment of a subscription to the Mississippi River Railroad Company, made by the county commissioners, and that neither said county commissioners nor the
14 said Barbour Lewis, as president thereof, had any lawful right, power, or authority to make said subscription or to issue, make, execute, and deliver said bonds and coupons and thereby bind Shelby County in the premises, but that the same was done wholly without authority of law, and is not binding on this defendant.

4. And for further plea defendant says that the bonds and coupons upon which plaintiff's action is founded purport to have been "issued under and by virtue of section 6 of an act of the Legislature of the State of Tennessee, passed February 25th, 1867, amended on the 12th day of February, 1869, and by authority conferred upon the county commissioners of Shelby County by section 25 of an act passed March 9th, 1867," when neither of the said acts nor any other acts of the Legislature conferred any lawful right, power, or authority upon said county commissioners, or Barbour Lewis, president thereof, or upon said Barbour Lewis as an individual, to issue, make, execute, and deliver said bonds and coupons or to make said subscription, and thereby to bind Shelby County in the premises.

W. B. GLISSON,
Attorney for Defendant.
G. P. M. TURNER,
Attorney for Defendant.

15 STATE OF TENNESSEE, *Shelby County:*

C. E. Smith, chairman of the county court and financial agent of Shelby County, makes oath that the facts stated in the above and foregoing pleas he verily believes are true in substance and in fact.

C. E. SMITH,
Chairman, &c.

Sworn to and subscribed before me, April 5, 1882.

W. B. WEISIGER, *D. C.*
BELL W. ETHERIDGE, *Clerk.*

Filed April 5, 1882.

BELL W. ETHERIDGE, *Clerk,*
By W. B. WEISIGER, *D. C.*

16 In the United States Circuit Court.

EX. NORTON *vs.* SHELBY COUNTY. } 2637.

In this cause, plaintiff having heretofore asked and obtained leave to file several grounds of replication, and permission having been given, but not entered of record, and said replication having been

already filed, on motion, it is ordered that such leave be now entered *nunc pro tunc.*

Entered May 18, 1882.

In the United States Circuit Court, at Memphis, Tennessee.

EX. NORTON *vs.* SHELBY COUNTY.

For replication to defendant's four pleas, filed herein April 5th, 1882, the plaintiff says:

First. That the defendant, Shelby County, having full power and authority to make said subscription and issue the said bonds, and said subscription was made and bonds executed and delivered by said board of county commissioners; and that afterwards, and after the supreme court of Tennessee had decided that said board was an illegal body, and that its acts and contracts on behalf of Shelby County were not binding on it, said defendant, with full knowledge thereof, fully ratified the acts of said board of county commis-
17 sioners in making said subscription and executing and issuing the bonds here sued on, and afterwards this plaintiff bought and became the owner of the bonds and coupons here sued on before maturity, for value, and relying on such ratification by defendant; all of which plaintiff is ready to verify, &c.

Second. That defendant, Shelby County, had full power and authority to make the said subscription and execute, issue, and deliver the said bonds and coupons here sued on, and the board of county commissioners of Shelby County, a court *de facto* in possession and exercising the function, powers, &c., before that time exercised by the quarterly county court of said county, made a subscription of $300,000 to the stock of said Mississppi River Railroad Company, and executed, issued, and delivered to said company, among others, the bonds and coupons here sued on in payment therefor, and that afterwards the supreme court of Tennessee decided that said board of county commissioners was an illegal body and its acts and contracts on behalf of said county not binding on it, and afterwards said defendant, with full knowledge of said decision, and with full power and authority to ratify the acts and contracts made on its behalf by said board of county commissioners, did fully ratify and confirm its action in making said subscription and executing and issuing the said bonds and coupons, including those here sued on, by ratifying and validating the levies of taxes for it by said board of county commissioners for the years 1867, 1868, and 1869, including in each of said years a tax to pay said bonds and coupons so issued as aforesaid, and collecting and appropriating to its own use the levies of said years;
18 and by levying, assessing, collecting, and using for the years 1870, 1871, 1872, 1873, 1874, 1875, and 1876 a special tax upon all the taxable property of said county for the express purpose of paying said bonds and coupons, and by paying out of the collections from such taxes all of the bonds and coupons so issued, except the sum of about $88,000 now unpaid and outstanding, and by voting the $300,000 of stock issued by said Mississippi River Railroad Company in consideration of said bonds and coupons at all the meetings

of the stockholders of said company during and through the years 1869, 1870, 1871, 1872, 1873, 1874, 1875, 1876, and 1877, and also by reporting during the years 1869 to 1877, inclusive, the said bonds and coupons among the debts and liabilities of defendant in the record and published statements of the financial condition of defendant; and plaintiff avers that after such ratification, and relying thereon, this plaintiff bought the bonds and coupons here sued on before their maturity for a valuable consideration and without notice of any defect therein, all of which plaintiff is ready to verify; wherefore, &c.

Third. That defendant, Shelby County, had full and ample authority to make the said subscription and issue the said bonds in payment therefor; that the board of county commissioners of said county, a *de facto* court in possession and exercising the powers, functions, and jurisdiction before then possessed and exercised by the quarterly county court of said county, subscribed for and in behalf of defendant $300,000 to the capital stock of said Mississippi River Railroad Company, and in payment therefor issued 300 bonds of defendant to the amount of $300,000, including the bonds and coupons here sued on, and received therefor stock to the amount
19 of $300,000 in said railroad company; that said board of county commissioners, from 1867 to November 15th, 1869, in fact held, possessed, and exercised, without question or opposition, all the powers, franchises, and jurisdiction devolved by law upon the quarterly county court of said county, voted said stock in all the stockholders' meetings and elections in said company, levied taxes and collected the same for the years 1867, 1868, 1869, upon all the taxable property of defendant county to pay said bonds and coupons, and that upon the quarterly county court of said county succeeding said board of county commissioners in November, 1869, the said quarterly county court, with full power and authority to act for and bind defendant in the premises, and well knowing all the facts concerning the said subscription of stock and the issuance of bonds, and also that the supreme court of Tennessee had decided that the said board of county commissioners of Shelby County was an illegal body, and not authorized to bind defendant by any of its acts, the said quarterly county court, on April 12th, 1871, on behalf of defendant, ratified said subscription and the execution and issuance of said bonds, and contracted on behalf of defendant with said Mississippi River Railroad Company to levy taxes and pay said bonds and coupons in consideration of the undertaking of said company that the funds so provided should not be misappropriated, and that the work on the road should be prosecuted with due diligence, which said undertakings on the part of said railroad company were and have been duly performed and fulfilled; and thereafter plaintiff, relying upon such ratification and contract of defendant to pay said bonds and coupons, bought the bonds and coupons here sued on for value
20 before maturity, and without notice of any defect therein or defense against them, all of which plaintiff is ready to verify, &c.

Fourth. And for a further replication plaintiff says that the board of county commissioners of defendant county was a *de facto* court, and during the years 1867, 1878, and 1869, to November 15th, 1869, held, possessed, and exercised, without question or opposition, all the jurisdiction, powers, and functions before then devolved by law on the quarterly county court of said county, and that said board of county commissioners, on the — day of ——, 1869, for and on behalf of defendant county, subscribed $300,000 to the stock of the Mississippi River Railroad Company, and executed and delivered March 1st, 1869, in payment therefor the negotiable coupon bonds of said county, amounting to $300,000, said defendant having then and there full power and authority to make said subscription and execute and issue the said bonds, the bonds and coupons here sued on being a part thereof, and that said $300,000 of stock of said railroad company was then issued to defendant county, and has ever since been held, retained, and voted by defendant; that defendant has regularly levied, assessed, and collected taxes for the years 1869, 1870, 1871, 1872, 1873, 1874, 1875, 1876, upon all the taxable property in its county for the express and specified purpose of paying the said bonds and coupons, and has paid all thereof except $88,000; that the taxes so levied were acquiesced in by the tax-payers and paid without question or opposition all through those years; that defendant, in its published and record statements of its financial condition, through all of said years has made these bonds a
21 part thereof, and that after these various acts of ratification and acquiescence and relying thereon, and before the maturity thereof, this plaintiff bought the bonds and coupons here sued on for value without any notice of defect therein or defense thereto, all of which he is ready to verify; wherefore, &c.

Fifth. And for further replication plaintiff says that during the year 1871 he was the president and principal owner of the Paducah and Gulf Railroad Company, a corporation then operating a line of railroad from Paducah, Kentucky, to Rives Station, Obion county, Tennessee, a distance of sixty-three miles, more or less, fully equipped, in full operation, out of debt, and worth about one million dollars; that during the summer of 1871 a proposition was made to consolidate the property and franchises of said Paducah and Gulf Railroad Company with those of the Mississippi River Railroad Company, and at this time said Mississippi River Railroad Company had done but little work on its line, none of which was completed, and probably less than one hundred and fifty thousand dollars had been expended upon its entire line; that the only assets of the Mississippi River Railroad Company of any value were certain county bonds (including those issued by defendant) issued in payment of subscription to stock taken by municipalities along the line of said road. Among these were 250 bonds issued by defendant, Shelby County, those sued on herein being a part thereof; that pending negotiations for such consolidation at the October term, 1871, of the regular quarterly court of Shelby County, repliant went before that court and represented to said court that a proposition for the

consolidation aforesaid was pending; that he was the owner
22 of a large portion of said Paducah and Gulf Railroad Company, which was clear of debt, and that before he would consent to such consolidation he wished to know definitely what defendant, Shelby County, intended to do as to the payment of its said bonds issued to said Mississippi River Railroad Company, and that unless it intended to pay same he would not put his property into and would oppose such consolidation, and his opposition would defeat it; that these bonds so issued by defendant constituted a large part of the assets of the Mississippi River Railroad Company, and he was unwilling to enter into such a consolidation unless said securities would be paid, all of which representations were true.

Thereupon repliant was then and there assured by defendant's quarterly court and the members thereof that said bonds were valid and would be paid.

On the same day the tax was ordered to be levied or collected to pay the same, and the former order suspending the previous levy of taxes was revoked.

Upon the faith of this representation, and relying upon the same, the consolidation was effected, and said bonds of Shelby County, a part of which are sued on herein, became the proporty of the Paducah and Memphis Railroad Company, and were afterwards sold to repliant before maturity and for value.

This repliant further avers that, relying upon the action and representations of defendants, through its quarterly court and the members thereof, that said bonds would be paid by defendant, said road was finished through Shelby County at a cost of not less than three hundred and fifty thousand dollars, and there was issued to
23 defendant three hundred thousand dollars of stock in the new consolidated company, and all the benefits contemplated by defendant in its said subscription have been realized.

That the representations of defendant, through its properly authorized agent, to repliant in regard to the payment of these bonds by defendant induced repliant to enter into the consolidation.

And repliant avers that the facts hereinabove stated and detailed constitute an estoppel on the defendant.

All of which plaintiff is ready to verify. Wherefore, &c.

HUMES & POSTON,
Attorneys for Plaintiff and Repliant.

Filed May 3, 1882.

In the Circuit Court of the United States, Western District of Tennessee.

EXTEIN NORTON *vs.* SHELBY COUNTY.

Defendant, for rejoinder to plaintiff's replication, says:

First. That it had power and authority to make a subscription and issue bonds and coupons in payment therefor to said railroad company, from the 25th day of February, 1867, to the 5th day of May, 1870, through its regularly organized county court, and in term time, but it did not do so; and it says that said board of county

commissioners, who assumed to make said subscription, and
24 the said Barbour Lewis, who assumed to issue, make, and deliver said bonds and coupons here sued on, for and in behalf of Shelby County, had no lawful power or authority to do so; that they were not officers or agents of Shelby County in any sense whatever, but were mere usurpers, and in said acts were in no way representing or authorized to represent or bind defendant.

And it says that it did not ratify said assumed subscription and assumed issuance of bonds in its name, but it says that it could not do so; that said assumed subscription and assumed issuance of bonds by said commissioners in the name of defendant were and are utterly void and incapable of ratification, either before or after the decision of the supreme court of Tennessee; that said so-called commissioners were an illegal body, and that their acts and deeds were not binding on defendant, and that defendant did not ratify said subscription or said bonds, or either of them; and of this it puts itself upon the country.

Second. That defendant had power to make said subscription and issue said bonds and coupons by its regularly organized county court, and in term time, during the time aforesaid, but not afterwards.

But it says that said board of county commissioners were not a court *de facto*, and that though they were in possession and assuming to exercise the powers, functions, and jurisdiction of the county court of Shelby County, and assumed to make said subscription as such, and issue, make, and deliver said bonds as aforesaid, that they had no lawful power to do so; that they were mere usurpers and nothing more, and acting in violation of the constitution and laws of Tennessee, and against the will of the defendant, as ex-
25 pressed in a bill of complaint of W. H. Walker and others—twenty-nine in number—all and each of whom were citizens, tax-payers, justices of the peace, and members of the county court of Shelby County, which bill of complaint was filed in the chancery court of Memphis, it being one of the courts of Shelby County, Tennessee, against James E. Merriman, Barbour Lewis, William Hack, W. H. White, and F. W. Lewis, defendants, on the 9th day of April, 1867, the said defendants composing the board known as the board of county commissioners, the bill alleging, amongst other things, that the complainants were the regular, lawful, and constitutional county court of Shelby County, and that defendants, unlawfully claiming to be officers and county commissioners, had usurped their offices, powers, privileges, franchises, and functions, and praying, amongst other things, that said so-called board of county commissioners be enjoined, &c.; which suit was taken by appeal to the supreme court of Tennessee, and was there pending for trial and undisposed of when said assumed subscription was made and said bonds here sued on were issued and for a long time afterwards, to wit, until the — day of ——, 187–, when said suit was finally decided by the said supreme court, said court holding that said so-called board of commissioners were an illegal body and their acts and contracts not binding on Shelby County.

And defendant says that it did not, with full knowledge or otherwise, ratify said subscription or action of the said commissioners in making the same, or in making and issuing said bonds sued on, by ratifying and validating the levies of taxes for it by the said board of county commissioners for the years 1867, 1868, and 1869,
26 and by collecting and appropriating to its own use the levies of said years, or by levying, collecting, and using for the years 1870, 1871, 1872, 1873, 1874, 1875, and 1876 an express tax as aforesaid for the express purposes as aforesaid, or by paying out of the collections from such taxes bonds and coupons so issued except about $88,000, or by voting the $300,000 stock in the stockholders' meetings of said railroad company as aforesaid, or by reporting, during the years 1869 to 1871, inclusive, the said bonds and coupons as aforesaid, or in any other way or manner whatever. And it says that, though it had power as aforesaid, to make said subscription up to the 5th day of May, 1870, it had no power to ratify a void subscription and make it valid, or to ratify and validate void bonds and coupons; and that said subscription and bonds and coupons were such.

And it says that after the 5th day of May, 1870, *that* it had no power, right, or authority to make a subscription, or issue bonds and coupons in payment therefor, to said Mississippi River Railroad Company, or any other person, company, association, or corporation, except upon an election to be first held by the qualified voters of Shelby County and the assent of three-fourths of the votes cast at said election, because the State of Tennessee adopted a new constitution in 1870, which took effect on and has been in force ever since the 5th day of May, 1870, and that Article II, Sec. 29, of said constitution, provides, amongst other things, as follows, to wit:

SEC. 29. * * * "The credit of no county, city, or town, shall be given or loaned to or in aid of any person, company, association, or corporation, except upon an election to be first held by
27 the qualified voters of such county, city, or town and the assent of three-fourths of the votes cast at said election. Nor shall any county, city, or town become a stockholder with others in any company, association, or corporation, except upon a like election and the assent of a like majority."

And defendant says that since the adoption of said constitution there has been no election of the qualified voters of Shelby County to determine whether or not a subscription should be made to said railroad company, or whether or not bonds and coupons should be issued, or as to whether or not said void subscription should be ratified, or said void bonds validated, and no act or deed of defendant was done either before or after the adoption of said constitution with that object, purpose, or intention.

And it says that each and every act and deed of defendant done by defendant since the adoption of said constitution of 1870 tending to ratify or validate said subscription and bonds and coupons was and is an illegal and void act, and was inhibited by said constitution.

And defendant says that plaintiff did not buy and become the

owner of said bonds and coupons here sued on before maturity for value and without notice of any defect therein, but it says that he had notice by the constitution and laws of Tennessee, by the recitals on the face of said bonds, and by the pendency of the suit in equity of Walker and others against said commissioners as aforesaid. And of this it puts itself upon the country.

Third. That defendant had full and ample authority by and through its regularly organized county court to make a sub-
28 scription and issue bonds and coupons in payment thereof to said railroad company from February 25th, 1867, to May 5th, 1870, as aforesaid, but not afterwards.

But it says that said board of county commissioners were not a *de facto* court; that there was no such office as county commissioner, or board of county commissioners of Shelby County, under the constitution and laws of Tennessee, and, there being no such legal office, there could be no such legal or *de facto* court or officers; and it says that said county commissioners were an assumed court, unlawfully claiming to be and represent the county court of Shelby County, but that, in fact and in law, they were usurpers, and wholly without authority; but assuming to have authority in opposition to the constitution and laws of Tennessee, and so holding by usurpation, and in possession, and so claiming to exercise the powers, functions, and jurisdiction before that time possessed and at that time belonging to the county court of Shelby County, and no other, it falsely assumed and unlawfully made and subscribed in the name of defendant $300,000 of stock to said railroad company, and unlawfully made and issued said bonds and coupons; and that although said commissioners, from 1867 to November 15th, 1869, held possession and assumed to exercise all the powers, franchises, and jurisdiction devolved by law upon the quarterly county court, voted said stock at the stockholders' meetings, levied taxes and collected the same for the years 1867, 1868, and 1869 on the property of defendant, yet they did so under an assumed authority, and without any lawful authority, but against the constitution and laws of the State of Tennessee, and by usurpation, and not otherwise.

And defendant says the county court of Shelby County re-
29 gained possession on November 15th, 1869, and had at that time power and authority to make a subscription and issue bonds and coupons to said railroad company, but that it did not do so.

And it says that it did not, on April the 12th, 1871, with full power and authority, and with full knowledge of the facts, and of the decision of the supreme court of Tennessee, by its quarterly county court, and on behalf of defendant, ratify said subscription and the execution and issuance of said bonds and contract on behalf of defendant with said Mississippi River Railroad Company to levy taxes and pay said bonds, in consideration of the undertaking of the said company that the funds so provided should not be misappropriated and the work on the road should be prosecuted with due diligence.

And it says that up to that time no subscription had been made and no bonds and coupons issued to said railroad company by de-

fendant, or by any one authorized to do so for it, and that no ratification with full knowledge or otherwise of any subscription or any bonds had with full knowledge or otherwise been made by it or by any one authorized to do so.

And it says that at that time, and for a long time before, *that* the constitution of Tennessee of 1870 was in effect and operation, the 29th section of the II Article of which at that time, and from and after May 5th, 1870, inhibited and forbade defendant from giving or loaning to or in aid of any person, company, association, or corporation the credit of said county, and from becoming a stockholder with others in any company, association, or corporation, except upon an election to be first held by the qualified voters of such
30 county, and the assent of three-fourths of the votes cast at said election; and defendant avers that no such election was ever held, and no such assent ever given to any proposition to subscribe to, or take stock in, or issue bonds and coupons for, or to ratify and confirm any subscription, or to validate and ratify bonds of any kind whatever, either valid or void.

And defendant says that plaintiff did not buy the bonds and coupons here sued on, relying on ratification and contract for value, before the maturity thereof, and without notice of any defect therein or defence against them.

But he says that plaintiff had notice, by the constitution and laws of Tennessee, by the recital on the face of said bonds, by the pendency of said suit in equity of Walker and others as justices, &c., and members, and composing the county court of Shelby County, against said commissioners, who assumed to issue said bonds in the name of Shelby County, and by the acts and orders of said county court, before then made and then of record, and by conversations with the justices and members thereof, and otherwise.

And of this the defendant puts itself upon the country.

Fourth. And, for further rejoinder, defendant says that the said board of county commissioners was not a *de facto* court, but that they were usurpers, and nothing more, and as such, and not otherwise, during the years 1867, 1868, and up to November 15, 1869, held possession of the county court-rooms and county records, and assumed to hold, possess, and exercise the jurisdiction and powers before then possessed and exercised, and which was then devolved by law on the quarterly court of Shelby County, but they
31 did not do so without question or opposition; and it says they were opposed therein and their assumed rights and powers questioned by all the justices of the peace composing the county quarterly court of Shelby County, by bill in equity by them as complainants and against said commissioners as defendants, as aforesaid, and by other good citizens of Shelby County; that said commissioners assumed to make, for and in behalf and in the name of Shelby County, a subscription to the Mississippi River Railroad Company, and to execute and deliver bonds and coupons in payment therefor, and that said bonds so issued purported to be negotiable bonds; but it says that said board of county commissioners had no right, power, or authority to make said subscription or issue

said bonds for or in the name of Shelby County. Defendant had full power and authority, from 1867 to May 5, 1870, to make a subscription and issue bonds and coupons in payment therefor to said railroad company; but he says that said $300,000 of stock was not issued and delivered to defendant, or to any one authorized to receive it, on the — day of ——, 1869, but that, if issued and delivered to any one, it was to said board of county commissioners, who were illegally assuming to represent and act for and on behalf of Shelby County when they were not so authorized.

Defendant did come into possession of said stock, together with many other relics and curiosities left by said county commissioners when they surrendered the possession of the county court-room, which they had unlawfully and by usurpation taken possession of; and that since then it has voted said stock in meetings of the stockholders of said railroad company, but that it did so without
32 full knowledge of the void nature of said bonds or subscription, and whilst the legality of said subscription was being discussed by able men, learned in the law, and by plaintiff, before the county court and elsewhere, he and others claiming that defendant was bound by said subscription and bonds, and still others denying that defendant was bound thereon; and that thus defendant, by its county court, actuated by doubt and fear, levied a tax for the years 1871, 1872, 1873, 1874, 1875, and 1876, as a Mississippi River railroad tax, after the constitution of 1870 had gone into operation, and without authority and against the law, but when defendants did not fully understand and know their rights, powers, and duties in the premises; and it says that the tax levies of 1869 were made out during the usurpations of said commissioners by the clerk of the county court, and that the books so made out were used by the county afterwards, because the time had passed when by law a tax should be levied, and the books in which said levies were made were the books of Shelby County, bought with its money, and in the hands of the county court clerk, and the levy of 1870 was made by said court with other levies, and without particular reference being made to that, and when defendants' county court did not know, as a matter of fact, whether said levy was legal or illegal.

And as to all assessments and payments made previous to May 5, 1870, that they were made without full knowledge and authority, but without any authority, being made in payment of void bonds to pay a void subscription, as aforesaid, when it did not know, as a fact, that said bonds and subscription were void.

The tax levies and payments for and on account of said sub-
33 scription and bonds made for the years 1871, 1872, 1873, 1874, 1875, and 1876 were illegal, unauthorized, and void levies, as being inhibited by the constitution of 1870, Article II, section 29, as aforesaid; and it says that the tax-payers did not willingly acquiesce therein, and pay said illegal assessments, but that many of them refused and still refuse, to pay the same; and defendant says that by its published and record statements it did not, and did not intend to, ratify said subscription and bonds, and that it could not do so if it had so intended. And defendant says that plaintiff did

not buy said bonds relying on acts of ratification and acquiescence before maturity, for value, and without any notice of defect therein or defence thereto, but it says that he had notice, by the constitution and laws of Tennessee, by the decision of the supreme court of Tennessee, by the recitals on the face of said bonds, by the name signed thereto as the maker thereof, by the pendency of the suit of the justices composing the county court against the said so-called county commissioners, and by the acts and orders of the county court, of record, and by conversations with justices of the peace composing the county court of Shelby County, and otherwise.

And of this defendant puts itself upon the country.

Fifth. For further rejoinder defendant says that during the year 1871 plaintiff was not the president and principal owner of the Paducah and Gulf railroad, and that said railroad company did not extend from Paducah, Kentucky, to Rives Station, Obion county, Tennessee, and said Paducah and Gulf railroad was not fully equipped, in full operation, out of debt, and worth one million dollars, or about that sum.

That no proposition was made during the summer of 1871
34 to consolidate said road with the Mississippi River railroad; and it says that at the time the Mississippi River Railroad Company had done a great deal of work on the line of said road, and in Shelby County had expended more than $150,000; that it had other assets besides the county subscriptions, and which were of great value.

Defendant says that plaintiff did come before the county court of Shelby County at its October term, 1871, and represented to said court that there was a proposition or probability of a consolidation, and that he was the owner of a portion of the Paducah and Gulf railroad, &c., &c., and it says that at that time the matter of a certain order passed by the county court of Shelby County on July 7, 1871, and then appearing on the records of the minutes of that day's proceedings in said court, was freely and fully discussed by plaintiff and by members of said county court, and that plaintiff then well knew, and has ever since known, that said subscription was null and void and said bonds void and illegal and not binding on Shelby County; and it says that it did not then and there assure plaintiff, by its quarterly court, or the members thereof, or otherwise, that said bonds were valid and would be paid; and it says that it never did, by its county quarterly court or otherwise, admit that said bonds were valid and binding on defendant and would be paid by it; and it avers that whenever the direct question has been presented to it it has always denied its liability thereon and the validity of said bonds and the right, power, and authority of said board of county commissioners to represent or bind it; and it denies that, relying upon the action and representations of defendant, through its
35 quarterly court and the members thereof, that defendant would pay said bonds when the said railroad was finished through Shelby County or otherwise; and though said consolidated company issued to defendant stock in said consolidated company, that defendant had nothing to do with its action in so doing, and

could not legally do so, being inhibited by the constitution as aforesaid.

And defendant says that plaintiff was not induced to enter into the consolidation by the representations of defendant through its properly authorized agents in regard to the payment of these bonds.

And defendant says that it is not estopped from denying the validity of said bonds and coupons here sued on, and that they bind the defendant in the premises.

And of this it puts itself upon the country.

W. B. GLISSON AND
G. P. M. TURNER,
Attorneys for Defendant.

Filed 20th May, 1882.

36 In the United States Circuit Court, at Memphis, Tennessee.

EX. NORTON
vs.
SHELBY COUNTY. } 2637.

1. The plaintiff joins issue with defendant on its rejoinder to his first replication.
2. The plaintiff joins issue with defendant on its rejoinder to his second replication.
3. The plaintiff joins issue with defendant on its rejoinder to his third replication.
4. The plaintiff joins issue with defendant on its rejoinder to his fourth replication.
5. The plaintiff joins issue with defendant on its rejoinder to his fifth replication.

HUMES & POSTON,
Attorneys for Plaintiff.

Filed May 20, 1882.

36½ United States of America, ——— Division of the Western District of Tennessee.

In the Circuit Court of the United States within and for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit thereof.

Proceedings had in said court at a regular term thereof begun and held for its May term, A. D. 1882, at the United States courthouse in the city of Memphis, in said district, on, to wit, the 29 day of May, A. D. 1882, in the following cause, to wit:

EXTEIN NORTON, Plaintiff,
vs.
SHELBY COUNTY, Defendant. } No. 2637.

By agreement of counsel in open court and for satisfactory reasons to the court appearing, it is hereby ordered that this cause be set for trial on Wednesday next.

36½ United States of America, ——— Division of the Western District of Tennessee.

In the Circuit Court of the United States within and for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit thereof.

Proceedings had in said court at a regular term thereof begun and held for its May term, A. D. 1882, at the United States court-house in the city of Memphis, in said district, on, to wit, the 31 day of May, A. D. 1882, in the following cause, to wit:

EXTEIN NORTON, Plaintiff,
vs.
SHELBY COUNTY, Defendant. } No. 2637.

In this cause came the parties, by their respective attorneys, and came also a jury of good and lawful men, to wit, L. Aydelott, Cash Mosby, J. B. Aldrich, John H. Priddy, Otto Schwill, L. Falkenberg, R. W. Lamb, Jacob Steinkuhl, O. F. Armstrong, I. I. May, Alf. G. Tuther, and A. Vaccaro, who were duly elected, tried, and sworn well and truly to try the issues joined between the plaintiff and defendant and a true verdict render according to the law and
36¾ evidence, who, having heard the evidence, listened to the arguments of counsel and received the charge of the court, upon their oaths do say they find the issues in favor of the defendant. It is therefore considered by the court that the defendant, Shelby County, go hence without day and recover of the plaintiff, Extein Norton, and Humes and Poston, his sureties on the cost bond, all the costs accrued herein, for which let execution issue.

37 *Bill of Exceptions.*

In the Circuit Court of the United States for the Western District of Tennessee.

EXTEIN NORTON
vs.
SHELBY COUNTY. } 2637.

On the trial of the above-entitled cause, after the reading of the pleadings, the plaintiff offered the following evidence:

1. One of the bonds and one of the coupons sued on, which are in words and figures as follows, to wit:

(See pages 8 and 9.)

38 It was then agreed by counsel for plaintiff and defendant that the other bonds and coupons here sued on are of the same character, series, and date, except as to numbers.

2. The plaintiff offered and read a certified transcript from the board of county commissioners and the county court of Shelby County, in words and figures as follows, to wit:

EXHIBIT "A" to Plaintiff's Replication.

Record of Quarterly Court of Shelby County, Tenn., in Matter of Shelby County Subscription to Mississippi River Railroad.

STATE OF TENNESSEE, } *ss:*
Shelby County, }

At a meeting of the board of county commissioners for Shelby County, Tennessee, at the January term, 1869, on Wednesday, January 6th, 1869, one of the days of said term, there was present and presiding the Honorable Barbour Lewis, president of said board, and William H. White, William Hack, and F. W. Louis, associate commissioners, when the following, among other, business was transacted, to wit:

Ordered, That the president of this board appoint a special committee for the purpose of considering the proposition made by the president and directors of the Mississippi River railroad, and that the committee report by next Friday.

Whereupon Commissioners Louis, Merriman, and White were appointed said committee, and the president of the board added by resolution.

Entered, Minute Book, page 296.

39 And on Friday, January 8th, 1869, one of the days of said January term, 1869—present, the Honorable Barbour Lewis, president, and James E. Merriman, Doctor William H. White, William Hack, and F. W. Louis, associate commissioners—the following appears of record, to wit:

The following having been submitted by Commissioner W. H. White as his individual reasons for favoring a subscription to the Mississippi river railroad—

On motion of Commissioner Merriman—

Ordered, That the same be received, accepted, and spread upon the minutes:

"I favor the taking of $300,000 in the Mississippi River railroad by the county for the following reasons:

"1st. Because it cannot, or at least there is no certainty of its being built without aid from Shelby County, while with its aid it becomes a fixed fact, as other counties are looking to and awaiting our action. If Shelby County subscribe, they will do so to their utmost capacity; if we do not, they will not.

"2d. Because it will bring to Memphis an immense trade annually that is now diverted to St. Louis, Louisville, and Cincinnati, amounting to at least one million dollars in the items of handling and selling, and because it will double or treble that amount in exports of merchandise to the rich country and tributary to the route.

"3d. Because it will give greatly increased vitality and profit to all kinds of business at once.

"4th. Because Memphis will necessarily be the distributing and circulating point for the three million dollars required to build the road and bridge the streams.

40 "5th. Because it will give work to our many thousand idle mechanics and laborers, and induce many from other sections by a certainty of good and prompt pay.

"6th. Because the distance to New York will be lessened fifty-one miles, as compared with one and eighty-one miles with the other of the present main routes, while thirty-four miles will be saved to Saint Louis and the great Northwest, and fifty-two miles saved from New York to New Orleans.

"7th. Because by its construction Memphis irresistibly becomes the great *entrepot* of travel and traffic between the Gulf and Northern and Eastern States, both of which are now diverted eastward fifty miles by the Mississippi Central road.

"8th. Because it will tend to cheapness of transportation of freights to and from Memphis as well as to the traveling public.

"9th. Because, without this road, the Mississippi and Tennessee railroad will never be what it ought and otherwise would be—a profitable, paying thoroughfare.

"The building of this link, makes it the great highway from North to South—a source of wealth to the city and country, instead of a drag and bone of contention.

"10th. Because its construction, with that of the Selma railroad, will, of necessity, hasten the completion of the Little Rock railroad, and onward to the Pacific—

"A scheme that is even now exciting the attention of Eastern capitalists, and will induce their concentration upon that enterprise, in which the entire Southwest is deeply interested, and Memphis in particular.

41 "11th. Because Memphis is bound to enlarge and prosper just in proportion as the agricultural and mineral wealth of the surrounding country and States is brought and deposited in her lap by railroads.

"12th. Because it is undeniable that all cities add to their greatness and power by building railroads leading through and to rich sections of country like that to be traversed by the Mississippi River railroad.

"13th. Because the rapid increase in the valuation of the Memphis and Charleston railroad and the Memphis and Ohio railroad stock within the past two years, or since the country began to revive from the ravages and loss of the war, makes it almost self-evident that stock taken in this road will not only be good stock, but make the stock of the Mississippi and Tennessee road valuable.

"14th. Because it will have a tendency to bring about a healthy and pleasant condition of society, by identifying interests and inspiring mutual confidence.

"15th. Because it will lessen crime and pauperism by affording remunerative labor with assured protection.

"16th. Because the people in the section of the country through which this road is to pass have long, and when called upon, regularly paid taxes going to benefit other portions of the country without deriving any direct benefit to their own locality. In a word, they

helped to build and sustain the other railroads leading out of the city.

"17th. Because I believe, from my past experience in like business transactions, that, instead of adding to the general burden of the large majority of our tax-payers, it will make it easier on account of the increased money put in circulation and the ready sale of property at an enhanced valuation, and it may have the effect to force plethoric landholders who have ever gone upon the principle
42 of getting all they could and holding all they get at prices out of reach, thereby retarding the growth and prosperity of the city, county, and State, to sell.

"18th. It will traverse a country of remarkable fertility, already in a high state of cultivation and yielding abundantly of food that our city greatly needs.

"It will thus prove a blessing to the poor and laboring classes of our citizens by improving the quality and cheapening the cost of their living.

"19th. Because, judging from the many memorials and earnest appeals and the able oft-repeated expressions of the public press of this city (the people's mouth-piece) in favor of this enterprise, the people of Shelby County are almost a unit as to the wisdom of extending the aid asked for to this road."

The following report having been submitted by Commissioner Merriman—

Ordered, That the same be received by the board and spread upon the minutes:

"Your committee, to whom was referred the application of the officers of the Mississippi River railroad for an appropriation from Shelby County of $300,000, to help in the construction of said road, beg to report that in their estimation the county will not this year, A. D. 1869, be in a condition to afford the assistance asked for within the period of time which the law seems to prescribe.

Your committee are also inclined to think that there is some State law requiring a matter of this kind to be submitted to the people for their approval, and although the privilege seems to be
43 given to this board to vote a certain amount of assistance in the charter granted to the railroad company, yet it may be fairly questioned whether litigation, embarrassment, and serious trouble might not follow an independent action of this board relative to the matter in question. Whatever the law may be, common judgment seems to approved most strongly of the policy of submitting a matter of such importance to the people.

It can never be hoped, as your committee think, by any one acquainted with the history of railroads in this section that any profit of an immediate or direct pecuniary character will result by an investment in this or any other road that could be projected at this time in this vicinity.

Your committee think that very few people could ever contemplate the return to the treasury of the county of any considerable part of the appropriation asked for. If, by some remote contingency, one-fourth of the sum in question should find its way back to the

coffers of Shelby County, your committee are of the opinion that such sum would be the maximum of what could possibly be expected by any one. We may consider, then, that $225,000 are being given by the citizens of the county toward the furtherance of the enterprise in question, and in a gift of such magnitude it has seemed to your committee that those who are expected to make this gift should have a voice in determining whether it should be made or not.

If this board, however, shall determine that this is not the correct view to take of this matter, your committee beg to state that works of very great importance, such as the construction of an almshouse, house of refuge, court-house, hospital, and the purchase of a potter's field, with other works of minor character equally important, are seriously demanded for the well-being and safety of this
44 community, and some might say for the continuance of our civilized condition. These works will involve large outlays.

Our citizens are now terribly burdened with taxes and disposed to rebel if they are taxed more than at present. The credit of the county, after a serious depreciation of eighteen months' duration, is now slowly recovering itself. Great care is needed at this particular crisis to avoid any recurrence of this depreciation. Our chief endeavor should be to keep the credit of the county to a par basis. All our appropriations, therefore, should be most judiciously and discriminatingly made.

Your committee are of the opinion that if it shall be deemed expedient to assist in building the road in contemplation, this county endure a burden for such purpose at this time of more than $25,000, or at the very outside $50,000, per annum, and will not be able to endure any more for ten years to come; and this amount, in order to benefit the road, would have to be provided for in bonds which could be hypothecated for the amount required.

Although every effort has been made for two years past to pay up the interest on bonds already issued, yet the full amount of interest is not yet paid.

Your committee have no definite data by which they could determine the amount of interest still unpaid. We are, probably, $50,000 in arrears on this item, perhaps $75,000.

Bondholders are aware of our endeavors to pay yet it is scarcely probable that our credit is sufficiently good to enable us to realize more than the city does in the absolute sale of our bonds.
45 The issuance, then, of bonds for $300,000 would only be an assistance of $150,000 at the most.

In the opinion of your committee the contemplated work cannot advance to completion without an appropriation from this county of all the money asked for, to wit, $300,000; and this amount it is impossible to supply in the present condition of our credit, unless at least $500,000 in bonds are loaned to the company asking our aid, with the proviso and strictest agreement that such bonds shall never be sold, but hypothecated; or, what would be much better, said bonds should be controlled by the county. What could be borrowed on them should be given to the railroad, and a sinking fund provided

for, by which the county could pay $25,000 per annum, until the debt was fully paid and the bonds redeemed.

Observing men are aware that the manipulation of such transactions is attended with great hazard. Unless intelligent and capable officials are in authority during all the time of the maturity of said bonds, the county would doubtless suffer, through misunderstanding, negligence, and various causes that can easily be understood, the loss of from fifty to one hundred thousand dollars.

In any event the county must prepare herself, in case the appropriation is determined on, to pay for said appropriation, and the consequent interest on the same, the full amount of $450,000, of which, at some time far in the future, the sum of $100,000 might be returned, without interest.

The county must then prepare herself to give to the Mississippi River railroad fully and absolutely the sum of $350,000.

46 It is possible that the county may be benefited much more than this amount.

Your committee have never known, however, that such benefits were equally distributed. The property of some parties would be greatly enhanced, mercantile interests might be much improved, yet a large proportion of our citizens would never derive any benefit whatever from the contemplated work, while all would be compelled to assist in said work.

The presumption is, however, that the county, as a community, would be greatly benefited.

Political economists always look out for the greatest good to the greatest number. The question is, Will the benefit to be derived equal the cost?

Your committee are decidedly of the opinion that it will much more than equal the cost, but the cost will be very great.

Other questions naturally following are these: "Should the board decide on this appropriation independent of the people?" and "Should the work be undertaken in the present condition of our finances?"

Your committee think the people should be consulted, and they also think that the present time is not favorable for the commencement of the work, provided the county has to pay the amount asked for in the time prescribed, and provided said work depends, as your committee suppose it does, upon the assistance of Shelby County.

Your committee have the sincerest regard for the advocates of the measure under consideration, and believe the work will be of

47 great benefit to the county, and would do all in their power to advance it consistent with their duty to the public.

Yet it cannot be concealed that the credit of the county is at present from 20 to 25 per cent. below par, and wise legislation should look first of all to an entirely healthy and prosperous condition of the finances; and your committee therefore recommend the adoption of cautious and judicious action in regard to the entire matter.

The following resolutions were offered by Commissioner Merriman, which were, on motion, unanimously adopted by the board:

Ordered by the board of commissioners for Shelby County, Tenn.,

That an appropriation of $300,000 be, and the same hereby is, made for the purpose of assisting the Mississippi River railroad in the building of said road through Shelby County, said appropriation to be made at the rate of $50,000 per annum, payable in bonds maturing in one, two, three, four, five, and six years, with interest at six per cent. per annum, payable annually; which bonds the president of this board is hereby authorized to issue immediately, signed by himself and countersigned by the clerk of the county court and sealed with the seal of the county court.

Ordered by the board of commissioners for Shelby County, Tenn., That a special tax shall be levied on the assessed value of the real estate of the county, which tax shall be called the M. R. R. R. tax, and said tax shall be regularly levied in such amount as shall meet the annual appropriations for the purpose of assisting in the building the Mississippi River railroad in Shelby County.

48 Ayes—Com'rs Merriman, White, Hack, Louis, and President Lewis.

The following resolution was offered by Commissioner Louis:

Ordered, That the president of this board be, and is hereby, directed to enter the subscription of Shelby County to the capital stock of the Mississippi River Railroad Company, for the sum of three hundred thousand dollars ($300,000), on the books of said company without delay, payable in bonds of the county at their par value.

Entered, Minute Book D, pages 298–304.

And on Tuesday, June 15, 1869, one of the days of the April term, 1869, of said commissioners' court—present, Hon. Barbour Lewis, president, and William H. White, F. W. Louis, and Edward Shaw, commissioners—the following entry appears of record:

Be it ordered, That the president of this board cast the vote of Shelby County on the stock owned by her in the Mississippi River railroad at the election for directors of said road to be held on the 24th instant, in the city of Memphis.

Entered, Minutes E, page 60.

And on Monday, June 28th, 1869, one of the days of a special term of said commissioners' court—present, Hon. Barbour Lewis, president of the board, and Jas E. Merriman, Dr. W. H. White,

49 and F. W. Louis, commissioners—the following entry appears of record:

On motion of Commissioner White, seconded by Commissioner Merriman, ordered, That the president of this board and the county clerk be instructed to sign, fill up, and attach the county seal of the county to the first fifty thousand dollars of the bonds and coupons voted by this board on behalf of the county to the Mississippi River railroad, and that they deliver the same to A. S. Mitchell, president, and W. H. Cherry, treasurer of said railroad company, and receive from them the six thousand ($6,000) dollars in warrants formerly issued to said railroad, together with the stock certificates of said railroad for the fifty thousand dollars, and return them to this board.

Ayes—Comm'rs Merriman, White, Louis, and President Lewis.
Entered, Minute Book E, page 80.

And on Tuesday, July 6th, 1869, one of the days of the July term, 1869—present, Hon. Barbour Lewis, president, and James E. Merriman, Dr. William H. White, and Edward Shaw, commissioners—the following entry appears of record:

The president and clerk of the board presented the following joint report:

To the Board of County Commissioners.

GENTLEMEN: In accordance with an order of the board passed on the 28th ultimo, we proceeded on the 30th to properly pre-
50 pare by filling up, numbering, signing, countersigning, &c., according to law, fifty one-thousand-dollar county bonds, with coupons attached, said bonds and coupons being payable on the first of January, 1870, and being the bonds, &c., for the first year's installment of the subscription by the county to the Mississippi River Railroad Company, and duly delivered the same to A. S. Mitchell, the president, and William H. Cherry, the treasurer of said railroad company.

The president of this board received from the president of said road a certificate for the County of Shelby of payment for five hundred one-hundred-dollar shares of stock in said road, for which he gave receipt, and then delivered said certificate to Mr. Loague, the county clerk, for safe keeping in one of the county safes.

The president of said road, upon receiving said bonds, gave up to us six county warrants which had been advanced to the road by order of this board for temporary use until the issue and delivery of said bonds.

Said warrants are each for the sum of one thousand dollars, payable to A. S. Mitchell, president, &c., on account of subscription to Mississippi River Railroad stock. They bear date April 20th, 1869, and are numbered respectively 4096, 4097, 4098, 4099, 4100, and 4101. We now bring them before the board, and recommend that they now be canceled in the presence of the board.

We further report that with said fifty one-thousand-dollar bonds there was one extra sent by the engravers, to be kept as a specimen of said bonds; that we have duly canceled it, and also the coupon attached, and bring the same now into court, and recommend that said bond and its coupon, neither being signed or countersigned, and both duly canceled, be deposited with the county trustee,
51 to be kept in his office as a specimen of said bonds and coupons, to be used by him for purposes of comparison when he shall take up and pay said bonds and coupons.

Respectfully,

BARBOUR LEWIS,
President of the Board.
JOHN LOAGUE, *Clerk.*

Said report, having been received, was unanimously approved and ordered to be recorded. And on motion it was further ordered that

the president of this board and the county clerk do now proceed to carry out and execute the recommendations contained in their report of this day in regard to canceling the six one-thousand-dollar warrants therein described, and also in regard to said specimen bond and coupon, all which was done accordingly; and that the county clerk safely keep said certificate for five hundred shares of the stock of the Mississippi River Railroad Company until further orders from this board, his safe being the most secure one owned by the county.

Entered, Minutes E, pages 88–90.

And on Tuesday, July 13, 1869, one of the days of said July term, 1869, of said commissioners' court—present, Hon. Barbour Lewis, president, and James E. Merriman, Dr. William H. White, F. W. Louis, and Edward Shaw, commissioners—the following appears of record:

Ordered, That the president of the board proceed at once, with the necessary assistance of the county clerk, to prepare and issue to
52 the Mississippi River Railroad Company the balance of the three hundred thousand dollars of bonds subscribed by this board to said road, and that the president of the board take a receipt from the president of said road for said bonds, and also a certificate to Shelby County for stock in said railroad to the same amount as its subscription to the same, a certificate for $50,000 having been already received, and leaving a certificate for stock to the amount of $250,000 only remaining to be received.

Ayes—Commissioners White, Shaw, and Judge Lewis.

Nays—Commissioner Louis and President *pro tem.* Merriman.

Entered, Minute Book E, Page 110.

And on Tuesday, July 20, 1869, one of the days of said July term, 1869—present, Hon. Barbour Lewis, president, and James E. Merriman and Dr. William H. White, commissioners—the following entry appears of record, to wit:

The following statement having been presented by the clerk, the same was received and adopted by the board:

OFFICE COUNTY COURT CLERK,
MEMPHIS, TENN., *July* 19, 1869.

Hon. Board of County Commissioners.

GENTLEMEN: The clerk of the county court begs leave respectfully to state that in accordance with an order passed by your honorable board on the 28th of June, 1869, he proceeded on the 30th of the same month to prepare, countersign, and seal with the seal of the county court the following bonds, with one coupon attached:
53 Bonds of one thousand dollars each in favor of the Mississippi River Railroad Company, numbered from 1 to 50, inclusive, payable January 1, 1870.

That on the 19th day of July, 1869, in accordance with an order passed July 13, 1869, he prepared, countersigned, and sealed with the seal of the county court bonds and coupons in favor of the Mississippi River Railroad Company as follows:

Bonds with two coupons attached, of one thousand dollars each, numbered from 51 to 100, inclusive, payable January 1, 1871.

Bonds with three coupons attached, of one thousand dollars each, numbered from 101 to 150, inclusive, payable January 1, 1872.

Bonds with four coupons attached, of one thousand dollars each, numbered from 151 to 200, inclusive, payable January 1, 1873.

Bonds with five coupons attached, of one thousand dollars each, numbered from 201 to 250, inclusive, payable January 1, 1874.

Bonds with six coupons attached, of one thousand dollars each, numbered from 251 to 300, inclusive, payable January 1, 1875.

There were also placed in my possession eight (8) blank bonds, with coupons attached, in excess of the three hundred already described. These bonds are described as follows:

One bond of one thousand dollars, with one coupon attached.

One bond of one thousand dollars, with two coupons attached.

54 One bond of one thousand dollars, with three coupons attached.

Two bonds of one thousand dollars each, with four coupons attached.

One bond of one thousand dollars, with five coupons attached.

Two bonds of one thousand dollars each, with six coupons attached.

The foregoing last-named eight bonds, with coupons attached, have been thoroughly canceled by the clerk with the canceling hammer of the county.

The first-named bond of one thousand dollars, with one coupon attached, has been filed with J. J. Powers, Esq., county trustee, for purposes of reference and as a specimen of the first $50,000 of bonds issued by your honorable board to the Mississippi River Railroad Company.

The remaining seven are now before you effectually canceled.

I would respectfully suggest that one of the two bonds of $1,000 each, with six coupons attached, be fastened in Minute Book "E," which is now in use by your honorable board, and that the remaining six bonds, with coupons attached, canceled, be filed with the county trustee to serve the purpose already mentioned.

Respectfully,

JOHN LOAGUE, *Clerk.*

MEMPHIS, TENN., *July* 21, 1869.

Received of John Loague, county court clerk of Shelby

55 County, seven blank bonds of the denomination of one thousand dollars each, ($1,000) one with one blank coupon attached, one with two of said coupons, one with three of the same, two with four of the same, one with five of the same, and one with six of said blank coupons, each of said coupons being for the sum of sixty ($60) dollars.

Said bonds were printed in excess of the number authorized to be issued as a subscription of stock of $300,000 to the Mississippi River Railroad Company, and, after having been duly canceled, are turned over to me by said Loague in pursuance of an order of the board of

county commissioners for Shelby County requiring him to make that disposition of them.

JOS. J. POWERS,
County Trustee.

The president of the board submitted the following report:

To the Board of County Commissioners.

GENTLEMEN: I have to report that on yesterday (July 19) I delivered to A. S. Mitchell, president of the Mississippi River Railroad Company, and to W. H. Cherry, treasurer of the same, two hundred and fifty (250) bonds of one thousand dollars each, being the balance of bonds for three hundred thousand dollars voted by the board to said railroad company, and received from said President Mitchell a receipt for the delivery of all said bonds to the amount of said $300,000, and also certificates of stock in said road to the amount of twenty-five hundred (2,500) shares in addition to the five hundred shares heretofore received on the 20th of June, 1869.

Said road has therefore received from this board in all fifty bonds for one thousand dollars each, and with one interest coupon attached, due January 1, 1870; fifty similar bonds, due January 1,
56 1871, and bearing two six per cent. interest coupons; fifty similar bonds, due January 1, 1872, with (3) three coupons to each; fifty bonds of like amounts, due January 1, 1873, with four coupons attached; fifty bonds for $1,000 each to become due on the first day of January, 1874, with five coupons to each; and fifty bonds for $1,000 each, to become due January 1, 1875, with six coupons attached to each, being in all bonds for three hundred thousand dollars, with interest-bearing coupons attached as above stated, and the county has received its proper receipts therefor, and also three thousand shares in the stock of said road, each share of stock representing one hundred dollars, and the whole amount of stock in said road received and now held by the county of Shelby being $300,000.

Said certificates of stock and said receipt have been by me delivered to Mr. John Loague, the county clerk, to be by him kept in the county safe in his office subject to the future orders of this board. His safe is burglar-proof, and by far the strongest and most secure one owned by the county.

The surplus blank bonds, eight in number, sent by the engravers of their own motion solely, to be used in case any bond should become mutilated or defaced in process of filling up, signing, countersigning, etc., having been duly canceled by the clerk in accordance with my suggestions; and his recommendations that one of them be kept as a sample in the book of the county in his office, and the remaining seven be kept as specimens by the county trustee, who will duly receipt for the same, I regard as wise and judicious.

Respectfully, BARBOUR LEWIS,
President Board of County Commissioners.

57 On motion of Commissioner Merriman—

Ordered, That the above report by the president of the

board is hereby approved, and ordered to be recorded and published.

Entered, Minute Book E, pages 117–123.

And on Monday, July 26, 1869, one of the days of the said July term, 1869—present, Hon. Barbour Lewis, president, and James E. Merriman, Doctor William H. White, and F. W. Louis, commissioners—the following entry appears of record:

Resolved by the board of county commissioners, That the subscription made by the County of Shelby to the Mississippi River Railroad Company was made with the expectation and understanding that the railroad should be built on the best and shortest route practicable, and this board will sustain said company in laying out said road to Covington on the shortest, best, and cheapest route possible.

Ayes—Comm'rs Merriman, Judge Lewis, and President *pro tem.* Louis.

Excused from voting.

I ask to be excused from voting on the resolution offered by the president of the board in regard to the line of the Mississippi River railroad simply because I think the president and directors of said road are the best judges as to which is the best route for them to take to reach Covington.

W. H. WHITE.

Entered, Minute Book E, page 135.

58 And on Friday, August 13, 1869, one of the days of the July term, 1869, of said court—present, Hon. Barbour Lewis, president, and James E. Merriman, Doctor William H. White, and F. W. Louis, commissioners—the following entry appears of record, to wit:

On motion, twenty cents was fixed as the rate of taxation on each $100 worth of real and personal property, on account of the Mississippi River railroad bonds.

Ayes—Comm'rs Merriman, Louis, and President Lewis.

Nays—Com'r White.

Entered, Minute Book E, page 175.

And on Tuesday, October 26, 1869, one of the days of the October term, 1869, of said court—present, Hon. Barbour Lewis, president, and James E. Merriman, Doctor William H. White, and Edward Shaw, commissioners—the following entry appears of record, to wit:

Whereas the good faith and honor of the County of Shelby require that the bonds of the county representing the annual subscription for six years to the Mississippi River Railroad Company should be paid in cash; and

Whereas a payment in county warrants would not enable said company to carry out its contracts based upon said subscription: Therefore

Be it resolved, That the county tax collector is hereby instructed

to collect the tax imposed to pay the subscription to the Mississippi River railroad in cash or legal currency only, and not in any
59 instance to receive warrants or scrip therefor, and that the county clerk transmit to him a certified copy of this order.

Entered, Minute Book E, page 341.

Shelby County Court. October Term, 1869.

MONDAY, *November 15th*, 1869.

The quarterly court of Shelby County met this day.

On motion, Esquire Thomas C. Bleckley was called to the chair.

Also present: Esquires R. N. Bond, D. M. Witherington, W. P. York, James Carroll, Thos. L. Giles, Edward Kiernan, Michael Foley, F. B. Millard, P. M. Dickerson, Thos. B. Mynatt, Andrew Stewart, Ferdinand Smith, Elijah Pulliam, Henry C. Brewer, W. H. Walker, Henry T. Jones, Thomas Holman, Hume F. Hill, Wm. S. Walton, John S. Black, James Hall, S. A. Moore, H. M. Griffith, John T. Elliott, John E. Burke, John Norton, G. W. F. Crook, James H. Swan, R. B. Miller, C. L. Brooks, J. H. Goodlett, and Jeremiah Massey, associate justices. Also present: Amos P. Curry, sheriff, and John Loague, clerk, when the following proceedings were had:

* * * * * * *

On motion, ordered, That the magistrates now setting proceed to organize the quarterly and quorum courts.

On motion, ordered, That we now proceed to elect a chairman for the quarterly and quorum courts to serve until January, 1870. Whereupon Esquire Thomas C. Bleckley was nominated and elected by acclamation.

* * * * * * *

Ordered by the court, That the clerk countersign all county
60 warrants which have been issued by the president of the board of county commissioners on account of appropriations prior to October 28th, 1869, and also all jury warrants which have been regularly certified up to date.

Ordered, That the court do now adjourn to meet Monday, January 3d, 1870.

Examined and approved.

T. C. BLECKLEY, *Chairman.*

Entered, Minute Book E, 392–404.

And on Monday, January 3d, 1870, one of the days of the January term, 1870, of the quarterly court of Shelby County, Tennessee—present, Esquire Thomas C. Bleckley, chairman, and R. N. Bond, D. M. Witherington, W. P. York, Thomas L. Giles, Edward Kiernan, Michael Foley, F. B. Millard, P. M. Dickinson, Thos. B. Mynatt, Ferdinand Smith, Elijah Pulliam, E. W. Caldwell, Henry C. Brewer, D. A. Harrell, W. H. Walker, Henry T. Jones, J. M. Crews, Hume F. Hill, William S. Walton, John S. Black, S. A. Moore, H. M. Griffith, John T. Elliott, John E. Burke, John Norton, Henry E. Green,

G. W. F. Cook, James H. Swan, R. B. Miller, C. L. Brooks, J. H. Goodlett, and Jeremiah Massey, justices—the following appears of record, to wit:

The following report having been submitted by the clerk, the same was, on motion, received and, with the tax books of 1869, referred to committee, consisting of Esquires Walker, Mynatt, and Crews, to report to-morrow morning, the county court clerk to retain in
61 his possession the tax books until the receipt of the report of said committee.

OFFICE COUNTY COURT CLERK,
MEMPHIS, TENN., *Jan'ry* 3, 1870.

To the worshipful county court of Shelby County:

I have the honor to submit for the inspection of your worship the tax books for the year 1869.

The assessed value of the real and personal property of Shelby County is fixed by the assessors of 1869 at $38,343,696.

* * * * * * *

The first fifty thousand dollars subscription to the Mississippi River Railroad Company falling due on the first of the present month, a tax of 20 cents on each one hundred dollars' worth of taxable property was levied for this purpose.

The amount that will be realized for the railroad company on account of this tax will be $76,687.39, being $26,687.39 more than the amount of the subscription falling due.

The last two taxes, viz., for judgments and railroad bond tax, are, by the action of the late board of county commissioners, to be paid in currency.

* * * * * * *

Respectfully submitted.

JOHN LOAGUE,
County Court Clerk.

Entered, Book E, page 413.

And on Wednesday, April 6, 1870, one of the days of the April term, 1870, of said quarterly court—present, Esq. Thomas C. Bleckley, chairman, and Esqs. York, Carroll, Giles, Kiernan, Mynatt,
62 Stewart, Pulliam, Caldwell, Brewer, Crews, Irby, Walker, Jones, Holman, Hill, Walton, Black, Hall, Moore, Swan, Miller, Brooks, Goodlett, Massey, and Stone—the following entry appears of record, to wit:

It is ordered by the court that the clerk report *instanter* the precise amount of warrants issued on appropriations or otherwise by the chairman of this court since the county commissioners were relieved from duty, and up to the first of April, 1870; also whether or not the amounts of interest on Memphis and Ohio railroad bonds and Mississippi River railroad bonds, reported by the clerk as outstanding indebtedness, comprises any interest on interest; if so, the precise amount on the bonds of each of said railroads.

Entered, Book E, page 535.

And on Saturday, April 9, 1870, one of the days of the said April term, 1870, of the quarterly court—present, Esq. Thomas C. Bleckley, chairman, and Esqs. Witherington, Kiernan, Mynatt, Caldwell, Walker, Jones, Hill, Walton, Black, Hall, Moore, Swan, Miller, Brooks, and Goodlett—the following appears of record, to wit:

The following report was submitted by the clerk:

OFFICE COUNTY COURT CLERK,
MEMPHIS, TENN., *April* 7, 1870.

To the worshipful quarterly court of Shelby County:

In obedience to an order passed yesterday I have the honor to report that the amount of warrants issued on appropriations
63 or otherwise by the chairman of your honorable court since the county commissioners were relieved from duty, and up to the first of April, 1870, is $29,490.15.

* * * * * * *

The clerk would also report that on the first day of January, 1870, the interest on three hundred bonds of $1,000 each, at six per cent., to the Mississippi River Railroad Company fell due.

The amount thus falling due being	$18,000 00
That the interest on the same to April 1st, 1870, was	4,500 00
	$22,500 00

* * * * * * *

Respectfully submitted.

JAMES REILLY, *Clerk.*

Which said report was, on motion, received and ordered to be spread upon the minutes.

Entered, Book E, page 556.

And on Monday, April 11, 1870, one of the days of the April term, 1870, of the quarterly court—present, Esquire Thomas C. Bleckley, chairman, and Esquires York, Kiernan, Mynatt, Smith, Pulliam, Caldwell, Crews, Irby, Walker, Jones, Hill, Walton, Black, Hall, Moore, Swan, Miller, Glisson, Brooks, Goodlett, and Stone—the following entry appears of record, to wit:

Ordered by the county court of Shelby County, That the following rates of taxation be, and the same are hereby, established for county purposes for the year A. D. 1870:

64 General purposes, 20 cents on the $100 worth of taxable property.

Mississippi river railroad bonds, 20 cents on the $100 worth of taxable property.

Coupon tax, 20 cents on the $100 worth of taxable property.

Judgments for costs in various courts, 10 cents on the $100 worth of taxable property.

Bridges, 10 cents on the $100 dollars worth of taxable property.

Privilege tax, one-half of State tax on all privileges taxed by the State.

Poll tax, same as State tax.

Ayes—Esqrs. York, Kiernan, Mynatt, Smith, Pulliam, Caldwell, Crews, Irby, Walker, Jones, Hill, Walton, Hall, Moore, Swan, Brooks, Goodlett, and Stone—18.

Noes—Esqrs. Black and Miller—2.

Entered, Book F, page 5.

Shelby County Court. April Term, 1870.

SATURDAY, *April* 16, 1870.

The quarterly court of Shelby County, Tenn., met pursuant to adjournment—present and presiding, Esquire Thomas C. Bleckley, chairman; also present Esquires Kiernan, Mynatt, Jones, Walton, Black, Hall, Moore, Swan, Miller, Glisson, and Goodlett, associate justices; also present C. W. Lyman, deputy clerk, and A. P. Curry, acting as sheriff—when the following proceedings were had:

* * * * * * *

Ordered, That the tax heretofore levied on the 11th inst.
65 for coupons be, and the same shall read as follows: Ten cents on each $100 worth of taxable property for the bonds to the Memphis and Ohio railroad, and 10 cents for the bonds of the Mississippi River Railroad Company, to be collected in cash.

Ordered, That the court do now adjourn to meet on the first Monday in July, A. D. 1870, at 9 o'clock a. m.

Examined and approved.

T. C. BLECKLEY, *Chairman.*

Entered, Minute Book F, pages 46–50.

And on Wednesday, July 6, 1870, one of the days of the July term, 1870, of the said quarterly court—present, Esquire Thomas C. Bleckley, chairman, and Esquires York, Carroll, Kiernan, Mynatt, Moncrief, Pulliam, Caldwell, Brewer, Crews, Harrell, Irby, Walker, Jones, Holman, Hill, Walton, Black, Swan, Miller, Glisson, Brooks, Goodlett, and Stone, associate justices—the following entry appears of record, to wit:

The following report was submitted by Esquire W. H. Walker:

To the county court of Shelby County:

We were appointed by your honorable court to represent the stock of Shelby County in the Mississippi River Railroad Company, at their annual meeting of stockholders on the 31st of May last.

We were prevented by an injunction from holding an election for directors. That injunction has been withdrawn, and the stockholders are to meet in Memphis on the 8th July inst.

66 There are many rumors of bad faith by the managers of the road, the truth of which we know nothing.

Respectfully,

WM. H. WALKER.
HENRY T. JONES, *J. P.*
HUME F. HILL.

Which report was, on motion, received and ordered to be spread upon the minutes.

Ordered by the court, That Hons. Robertson Topp and A. H. Douglass be, and they are hereby, appointed to cast the vote of Shelby County at the election to be held July 8, 1870, of the stockholders of the Mississippi River Railroad Company for directors of said company, in place of Esqs. William H. Walker and Henry T. Jones, whose resignations have been tendered and accepted this day, and that the clerk certify the fact to Messrs. Topp and Douglass by furnishing a copy of this order.

Entered, Book F, pages 58, 59.

And on Thursday, October 6, 1870, one of the days of the October term, 1870, of the said quarterly court—present, Esq. Thomas C. Bleckley, chairman, and Esqs. Witherington, Forgey, York, Ligon, Giles, Kiernan, Winters, Moncrief, Sneed, Pulliam, Crews, Herring, Allen, Walker, Jones, Holman, Buntyn, Hoegel, Brown, Burke, Elliott, Moore, Miller, Glisson, Brooks, Massey, H. C., and Stone—the following entry appears of record, to wit:

The following report was submitted by the clerk:

67

OFFICE COUNTY CLERK,
MEMPHIS, TENN., *October* 6, 1870.

To the worshipful county court of Shelby County, Tenn.:

May it please your worships, I have the honor herewith to present to you a tabular statement, exhibiting the value of taxable property in each of the seventeen civil districts of the county, with the rate of taxation and the tax computed for the State, and the various taxes levied for general and special county purposes.

* * * * * * *

Total valuation $35,064,924 00

* * * * * * *

For Miss. River railroad bond tax at 20c. $70,129 85

* * * * * * *

Respectfully submitted.

JAMES REILLY, *Clerk.*

Which said report was, on motion, received and ordered to be entered of record, and a committee, consisting of Esqs. Walker, Glisson, and Winters, appointed to examine the tax books referred to, and report with reference to compensation for services rendered in preparing the same.

Entered, Book F, page 189.

And on Thursday, October 13, 1870, one of the days of the said October term, 1870—present, Esquire Thomas C. Bleckley, chairman, and Esquires Winters, Elliott, Moore, Burke, and Glisson, associate justices—the following entry appears of record, to wit:

68 Ordered by the county court, That the tax collector of Shelby County be, and is hereby, authorized and instructed to collect in cash, for the year 1870, all the railroad and coupon tax, and tax assessed for the payment of judgments.

* * * * * * *

Statement of Mississippi River railroad bonds and coupons canceled.

March 19, 1870.

Coupons Nos. 1 to 138, inclusive, total 138, @ $60		$8,280
139 to 250,	112, @ $60	6,720
251 to 300,	50, @ $60	3,000
		$18,000

Bonds Nos. 1 to 15, 1,000 ea.	$15,000
" " 16 to 18, 1,000 ea.	3,000
" " 19 to 20, 1,000 ea.	2,000
" " 21 to 23, 1,000 ea.	3,000
	$23,000

I, William McLean, tax collector for Shelby County, certify that the above is a full, true, and correct statement of Mississippi River railroad bonds and coupons collected by me and canceled in 1870 up to this date.

Memphis, Tenn., Oct. 12, 1870.

Received the above bonds and coupons, Oct. 12, 1870.

JAMES REILLY, *Clerk.*

Ordered by the court, That the clerk of this court be, and he is hereby, authorized to cancel the Mississippi River railroad bonds and coupons paid over to him by William McLean, tax collector, and that said bonds and coupons be filed in his office.

To the worshipful county court of Shelby County, Tenn.:

The undersigned respectfully represent that they have canceled the Mississippi River railroad bonds and coupons set forth
69 in the statement of Wm. McLean, tax collector, October 12, 1870.

JAMES REILLY,
County Court Clerk.
W. B. GLISSON, *J. P.*

Entered, Book F, pages 246, 247.

And on Monday, January 2d, 1871, one of the days of the January term, 1871, of said quarterly court—present, Esquire Thomas C. Bleckley, chairman, and Esquires Witherington, York, Ligon, Reynolds, Duncan, Giles, Winters, Moncrief, Sneed, Pulliam, Caldwell, Brewer, Crews, Allen, Irby, Walker, Jones, Holman, Jr., Buntyn, Hoegel, Brown, Burke, Elliott, Moore, Miller, Glisson, Brooks, Massey, H. C., and Stone—the following entry appears of record, to wit:

The following report was submitted by W. P. Wilson, Esq., attorney for the county:

To the worshipful county court of Shelby County, at January quarterly term, 1871:

The undersigned, having been ordered by your honorable body to examine and ascertain whether or not any unlawful appropriations made during the time that the county commissioners were in power, and to use such means as are provided by law to recover back the amounts so paid out, report that they have accordingly made such examination and have brought suit against Barbour Lewis to test the law in respect to a large number of appropriations made by the late county commissioners, to make good warrants issued on appropriations, and what said warrants were worth on the market.

70 If successful in that suit it will then be time enough to bring suit on the others.

Respectfully submitted.

W. P. WILSON,
Att'y for Shelby County.
T. C. BLECKLEY, *Ch'n.*

January 2d, 1871.

Which said report was, on motion, received and committee continued.

Entered, Minute Book F, page 249.

And on Thursday, January 12th, 1871, one of the days of the January term, 1871, of the said quarterly court—present, Esquire Henry T. Jones, chairman *pro tem.* and Esquires York, Rose, Winters, Moncrief, Sneed, Wallace, Pulliam, Caldwell, Crews, Walker, Hoegel, Brown, Burke, Elliott, Moore, Miller, Glisson, and Brooks—the following entry appears of record, to wit:

It appearing to the court that the condition of the interests of the County of Shelby, in the subscription of three hundred thousand dollars ($300,000) to the stock in the Mississippi River railroad is very complicated and perhaps precarious: It is therefore ordered, That the committee or commissioners heretofore appointed to examine into and report the condition of the interests of Shelby County and for other purposes be enlarged by the appointment of three commissioners or committeemen, consisting of Esquires J. M. Crews, William Wallace, and B. F. Duncan, to join the commissioners or committee already appointed in their investigations, and make a joint report at the time already designated for their report on the various matters relating to the whole subject.

71 Said special committee to act in conjunction with or separate from the committee already appointed, as said special committee may deem proper.

Entered, Minute Book F, page 324.

The order appointing said original committee having been entered on Tuesday, October 11th, 1870, when there was present Esquire Thomas C. Bleckley, chairman, and Esquires Witherington, Forgey, Kiernan, Winters, Sneed, Pulliam, Caldwell, Crews, Herring, Allen, Irby, Jones, Holman, Buntyn, Hoegel, Brown, Burke, Elliott, Moore, Miller, Glisson, Brooks, and Stone, and is as follows:

Ordered, That a committee, consisting of Esquires Glisson, Winters, and Burke, together with W. P. Wilson, attorney of Shelby County; Hon. A. H. Douglass and Hon. Robertson Topp, be, and the same are, appointed to examine into the matters and things in reference to the Mississippi River Railroad Company, and shall report what action shall be taken by this court in reference thereto.

Entered, Minute Book F, page 230.

And on Tuesday, April 11th, 1871, one of the days of the April term, 1871, of said quarterly court—present, R. B. Miller, chairman *pro tem.*, and Esquires Witherington, Forgey, York, Giles, Rose, Winters, Moncrief, Sneed, Wallace, Pulliam, Caldwell, Crews, Herring, Allen, Irby, Walker, Jones, Holman, Burke, Elliott,
72 Moore, Buntyn, Hoegel, Brown, Glisson, Brooks, Massey, H. C., and Stone—the following entry appears of record, to wit:

The following report was submitted to the court:

To the honorable county court for Shelby County:

The undersigned, a committee appointed by your honorable body at the present term to consider and examine the report made by Samuel Mosby, W. B. Greenlaw, W. M. Farrington, H E. Garth, A. Woodruff, and Hiram A. Partee, Esquires, in reference to the county finances, looking to a speedy and permanent improvement of them, beg to report they have performed the duty assigned, and, in conjunction with the above committee, submit the following report, to wit:

* * * * * * *

Resolved, 12. "That a special tax of fifteen cents (15c.) on the one hundred dollars be assessed to pay the Mississippi River railroad bond tax."

Which resolution was rejected.

* * * * * * *

(Signed)

S. MOSBY.
H. E. GARTH.
WM. B. GREENLAW.
WM. M. FARRINGTON.
A. WOODRUFF.
ELIJAH PULLIAM, *J. P.*
E. W. CALDWELL, *J. P.*
W. WALLACE, *J. P.*
P. M. WINTERS, *J. P.*
J. M. CREWS, *J. P.*
W. B. GLISSON, *J. P.*

Entered, Minute Book F, page 414.

The report of Wm. Wallace *et als.*, the committee to inves-
73 tigate and examine the books, accounts, contracts, and condition of the Mississippi River Railroad Company, was, on motion, received and filed.

Entered. Book F, page 420.

And on Wednesday, April 12th, 1871, one of the days of the April

term, 1871, of said quarterly court—present, Robert B. Miller, chairman *pro tem.*, and Esquires Forgey, Giles, Rose, Winters, Moncrief, Sneed, Pulliam, Caldwell, Brewer, Crews, Allen, Walker, Jones, Holman, Buntyn, Hoegel, Brown, Burke, Elliott, Moore, Glisson, Brooks, Massey, H. C., and Stone—the following entry appears of record, to wit:

On motion of Esquire J. M. Crews, Esquires Winters, Rose, and Caldwell were appointed by the court to cast the vote of Shelby County in the next election to be held for directors of the Mississippi River Railroad Company.

Entered, Book F, page 435.

* * * * * * *

Ordered by the court, That the action of this court refusing to levy the special tax of fifteen cents on the one hundred dollars' worth of property of Shelby County, to pay the interest on the bonds of the Mississippi River Railroad Company, be, and the same is hereby, reconsidered and rescinded, and upon application of Alfred T. Lacey, president of the Mississippi River Railroad Company, and also John L. Norton, secretary, a special tax of fifteen cents on the one hundred dollars be assessed to pay the interest on the Mississippi River railroad bonds.

74 But the same shall not be a waiver of the right of this court to order the money collected on said assessment withheld at any time when it may appear to the courts that the officers of the road are misappropriating funds or failing to prosecute the work on the road with due diligence.

To which above order the said Lacey and Norton agree.

Entered, Book F, page 438.

And on Friday, July 7th, 1871, one of the days of the July term, 1871, of the said quarterly court—present, Esquire Thomas C. Bleckley, chairman, and Esquires Witherington, Forgey, York, Ligon, Reynolds, Giles, Rose, Winters, Moncrief, Sneed, Wallace, Pulliam, Brewer, Crews, Herring, Harrell, Allen, Irby, Walker, Jones, Holman, Buntyn, Hoegel, Brown, Burke, Elliott, Moore, Miller, Glisson, Brooks, Massey, H. C., and Stone—the following entry appears of record, to wit:

Whereas on April 12, 1871, the same being one of the days of the April term, 1871, of this court, an order was passed assessing a tax of fifteen cents on the one hundred dollars' worth of property in Shelby County, to pay the bonds issued by Barbour Lewis, president of the board of county commissioners, to the Mississippi River Railroad Company; and whereas said tax was levied conditioned upon the "proper appropriation of funds," and "the prosecution of the work on said railroad with due diligence;" and whereas the said tax was levied under a misapprehension or without a knowledge of the law in the case; and whereas the supreme court of Tennessee have lately decided that the acts of Bar-

75 bour Lewis, as president of the board of county commissioners of Shelby County, were unauthorized and void; and whereas the said bonds were issued by the said Barbour Lewis, president,

&c., without the consent of this court had and obtained, according to law; and whereas it appears to the satisfaction of the court that the said railroad company have not, nor are not, prosecuting the work on said road with due diligence; and whereas this court has been advised that said tax assessment is illegal: Now, therefore, for the joint and several reasons above stated, be it ordered by the court, That the said order of April 12, 1871, laying a tax of fifteen cents on the one hundred dollars' worth of property as aforesaid, be, and the same is hereby, reconsidered, revoked, and held for naught, and the tax collector of Shelby is hereby ordered to fail and refuse to collect said tax.

Be it further ordered, That the clerk of this court furnish to Wm. McLean, tax collector, a copy of this order.

And be it further ordered, That this order shall not be revoked, except by a vote of the majority of the magistrates of Shelby County.

Entered, Book F, page 511.

And on Tuesday, October 3rd, 1871, one of the days of the October term, 1871, of said quarterly court—present, Esquire Thomas C. Bleckley, chairman, and Esquires Witherington, York, Duncan, Giles, Hall, Spelman, Winters, Moncrief, Pulliam, Caldwell, Wallace, Brewer, Harrell, Allen, Irby, Walker, Jones, Holman, Hoegel, Brown, Burke, Elliott, Moore, Miller, Glisson, Brooks, and Massey,
76 H. C., associate justices—the following entry appears of record, to wit:

The following report was submitted to the court and ordered to be spread on the minutes:

OFFICE COUNTY COURT CLERK,
MEMPHIS, TENN., *Oct.* 2, 1871.

To the worshipful county court of Shelby County, Tenn.:

May it please your worships, I have the honor herewith to present to you a tabular statement exhibiting the value of taxable property in each of the 17 civil districts of the county, with the rate of taxation, and the tax computed for the State, and the various taxes levied for general and special county purposes.

* * * * * * *

Total valuation $37,881,601 38

* * * * * * *

For Mississippi River Railroad bond tax, @ 15 cents $56,822 40½

* * * * * * *

The above report makes an exhibit of the taxes under the first assessment, and includes the 15 cents levied to pay the bonds issued by Barbour Lewis, president of the board of county commissioners, to the Mississippi River Railroad Company.

By a subsequent order of the court this tax was revoked.

All of which is respectfully submitted,

JAMES REILLY, *Clerk.*

Entered, Book F, page 542.

And on Thursday, October 5, 1871, one of the days of the October term, 1871, of said quarterly court—present, Esquire Thomas C. Bleckley, chairman, and Esquires Witherington, York,
77 Ligon, Reynolds, Duncan, Giles, Hall, Spelman, Winters, Moncrief, Pulliam, Caldwell, Wallace, Brewer, Allen, Walker, Jones, Holman, Buntyn, Hoegel, Brown, Burke, Elliott, Moore, Miller, Glisson, Brooks, Massey, H. C.; Massey, Jeremiah, and Stone—the following entry appears of record, to wit:

Ordered, That the order of this court made at the July term, 1871, suspending the collection of the tax levied to pay the subscription of Shelby County to the capital stock of Mississippi River Railway Company be, and the same is hereby, rescinded, and the tax collector is hereby instructed to proceed with the collection of said tax of fifteen cents on the hundred dollars as already assessed, and that when collected the same shall be held subject to be paid over to the parties entitled to receive it on the order of the chairman of this court whenever he shall have satisfactory evidence that the work on the road from Memphis to the north line of Shelby County is under contract and in process of construction, the money to be paid out only on the estimates of the chief engineer of the work.

Ayes—Esquires York, Ligon, Reynolds, Duncan, Giles, Hall, Spelman, Winters, Moncrief, Pulliam, Caldwell, Wallace, Brewer, Hoegel, Brown, Burke, Elliott, Moore, Miller, Brooks, Massey, Jeremiah, and Stone—22.

Noes—Esquires Witherington, Allen, Walker, Jones, Holman, Buntyn, and Glisson—7.

Entered, Book G, page 7.

And on Tuesday, October 10th, 1871, one of the days of the
78 said October term, 1871—present, Esquire Thomas C. Bleckley, chairman, and Esquires Witherington, Ligon, Hall, Spelman, Winters, Moncrief, Wallace, Pulliam, Caldwell, Brewer, Allen, Irby, Jones, Buntyn, Hoegel, Brown, Burke, Elliott, Moore, Miller, Glisson, Brooks, and Massey, H. C., associate justices—the following entry appears of record, to wit:

Whereas the assessments for State and county taxes made by the late so-called county commissioners of Shelby County for the years 1867, 1868, and 1869 were made for taxation authorized by law, but not by the county court, the only agents of the county and State authorized to make such assessments; and whereas said assessments are invalid without the approval of this court; and whereas a large majority of the tax-payers have paid the taxes thus assessed, and it would be unjust to allow the delinquent tax-payers to escape this burden that prompt payers have long since settled:

It is therefore ordered by this court, That the rate of taxation fixed by said commissioners for said years of 1867, 1868, 1869, for State and county purposes in the County of Shelby, State of Tennessee, and the valuation and assessments of realty in said county as shown by the tax books of said county commissioners for said years, be adopted by this court as fully as if this court had made and fixed them in the first instance, and that W. W. McDowell, attorney for

said State and county, proceed to enforce the claims and liens of said county and State in pursuance to the former order of this court made July 7th, 1871.

It is further ordered, That said order of July 7th be so modified as to allow the attorney for said county and State reasonable compensation for his services instead of a certain per cent., as authorized in said former order.

79 But nothing in these orders shall be construed as a ratification of any other acts of said commissioners, or of their authority to have made the said assessments in the first place.

Entered, Book G, page 49.

And on Wednesday, January 3d, 1872, one of the days of the January term, 1872, of the said quarterly court—present, Esquire Thomas C. Bleckley, chairman, and Esquires Witherington, Murray, York, Ligon, Duncan, Giles, Hall, Spelman, Winters, Moncrief, Sneed, Wallace, Pulliam, Caldwell, Crews, Herring, Allen, Walker, Jones, Holman, Buntyn, Hoegel, Brown, Burke, Elliott, Moore, Miller, Glisson, Brooks, Massey, H. C.; Massey, Jeremiah, and Stone, associate justices—the following entry appears of record, to wit:

On motion of Esquire Wallace, a committee, consisting of Esquires Wm. Wallace, T. L. Giles, and B. F. Duncan, were appointed to represent and vote the stock of Shelby County in the Mississippi River Railroad Company in the convention on the 9th and 25th of January, 1872.

Entered, Book G, page 90.

And on Tuesday, January 9th, 1872, one of the days of the said January term, 1872—present, Esquire Thomas C. Bleckley, chairman, and Esquires Witherington, Murray, York, Ligon, Duncan, Giles, Spelman, Winters, Moncrief, Sneed, Wallace, Pulliam,

80 Caldwell, Herring, Allen, Irby, Walker, Jones, Holman, Buntyn, Hoegel, Brown, Burke, Elliott, Moore, Miller, Glisson, Brooks, Massey, H. C., and Stone, associate justices—when the following entry appears of record, to wit:

Ordered by the court, That E. W. Caldwell be appointed, in addition to the delegates already appointed, to vote the stock of the County of Shelby in the meeting of the stockholders of the Mississippi River Railway Company.

Entered, Book G, page 123.

And on Thursday, July 11, 1872, one of the days of the said July term, 1872—present and presiding, Esquire Thomas C. Bleckley, chairman; also present, Esquires Witherington, Murray, Ligon, Spelman, Winters, Moncrief, Sneed, Wallace, Pulliam, Caldwell, Herring, Harrell, Allen, Irby, Walker, Jones, Hoegel, Brown, Elliott, Hall, Miller, Glisson, Brooks, and Massey, H. C., associate justices—the following entry appears of record, to wit:

The following report was submitted to the court:

To the worshipful county court of Shelby County, Tenn.:

I have the honor to submit the following report of bonds and

coupons of the Mississippi River Railroad Company taken up and canceled by Wm. McLean, tax collector of Shelby County, and filed in my office, and showing the dates upon which they were received by me, and the number of each bond:

81

No. of bond.	No. of coupon.	When delivered by tax collector.	Amount.
1	1	October 12, 1870	$1,060 00
2	1	" "	1,060 00
3	1	" "	1,060 00
4	1	" "	1,060 00
5	1	" "	1,060 00
6	1	" "	1,060 00
7	1	" "	1,060 00
8	1	" "	1,060 00
9	1	" "	1,060 00
10	1	" "	1,060 00
11	1	" "	1,060 00
12	1	" "	1,060 00
13	1	" "	1,060 00
14	1	" "	1,060 00
15	1	" "	1,060 00
16	1	" "	1,060 00
17	1	" "	1,060 00
18	1	" "	1,060 00
19	1	" "	1,060 00
20	1	" "	1,060 00
21	1	" "	1,060 00
22	1	" "	1,060 00
23	1	" "	1,060 00
	1 of bond 24	" "	60 00
25	1	February 16, 1871	1,060 00
26	1	" "	1,060 00
	1 of bonds 27, 28, 29	October 12, 1870	180 00
30	1	February 16, 1871	1,060 00
31	1	" "	1,060 00
32	1	April 24, 1871	1,060 00
33	1	" "	1,060 00
34	1	February 16, 1871	1,060 00

82

35	1	" "	1,060 00
36	1	" "	1,060 00
37	1	" "	1,060 00
38	1	" "	1,060 00
39	1	" "	1,060 00
40	1	" "	1,060 00
41	1	" "	1,060 00
42	1	" "	1,060 00
43	1	" "	1,060 00

No. of bond.	No. of coupon.	When delivered by tax collector.	Amount.
44	1	April 24, 1871	1,060 00
45	1	" "	1,060 00
46	1	February 16, 1871	1,060 00
47	1	April 24, 1871	1,060 00
48	1	February 16, 1871	1,060 00
49	1	" "	1,060 00
50	1	" "	1,060 00
51	1 & 2	June 3, 1871	1,120 00
52	1 & 2	" "	1,120 00
53	1 & 2	February 16, 1871	1,120 00
54	1 & 2	July 8, 1871	1,120 00
55	1 & 2	May 17, 1872	1,120 00
56	1 & 2	" "	1,120 00
57	1 & 2	" "	1,120 00
58	1 & 2	" "	1,120 00
59	1 & 2	" "	1,120 00
60	1 & 2	" "	1,120 00
61	1 & 2	" "	1,120 00
62	1 & 2	May 31, 1872	1,120 00
63	1	April 24, 1871	1,060 00
	1 & 2 of B. 64	June 3, 1871	120 00
65	1 & 2	February 16, 1871	1,120 00
66	1	" "	1,060 00

83

67	1	April 24, 1871	1,060 00
68	1	" "	1,060 00
69	1	February 16, 1871	1,060 00
70	1	" "	1,060 00
71	1 & 2	May 17, 1872	1,120 00
72	1	April 24, 1871	1,060 00
73	1 & 2	May 17, 1872	1,120 00
74	1 & 2	" "	1,120 00
75	1 & 2	" "	1,120 00
76	1 & 2	" "	1,120 00
77	1 & 2	" "	1,120 00
78	1 & 2	" "	1,120 00
79	1 & 2	" "	1,120 00
80	1 & 2	" "	1,120 00
81	1 & 2	" "	1,120 00
82	1 & 2	" "	1,120 00
83	1 & 2	" "	1,120 00
84	1 & 2	May 31, 1872	1,120 00
85	1 & 2	" "	1,120 00
86	1 & 2	" "	1,120 00
87	1 & 2	" "	1,120 00
88	1 & 2	" "	1,120 00
89	1 & 2	" "	1,120 00
90	1 & 2	" "	1,120 00

No. of bond.	No. of coupon.	When delivered by tax collector.	Amount.
91	1 & 2	June 6, 1872	1,120 00
92	1 & 2	" "	1,120 00
	1 of bond 93	October 12, 1870	60 00
	1 " 94	" "	60 00
	1 " 95	" "	60 00
	1 " 96	" "	60 00
	1 " 97	" "	60 00
98	1 & 2	February 16, 1871	1,120 00
84			
99	1 & 2	April 24, 1871	1,120 00
	1 of bond 100	October 12, 1870	60 00
	1 " 101	" "	60 00
	1 " 102	" "	60 00
	1 " 103	" "	60 00
	1 " 104	" "	60 00
	1 " 105	" "	60 00
	1 " 106	" "	60 00
	1 " 107	" "	60 00
	1 " 108	" "	60 00
	1 " 109	" "	60 00
	1 " 110	" "	60 00
	1 " 111	" "	60 00
	1 " 112	" "	60 00
	1 " 113	" "	60 00
	1 " 114	" "	60 00
	1 " 115	" "	60 00
	1 " 116	" "	60 00
	1 " 117	" "	60 00
	1 " 118	" "	60 00
	1 " 119	" "	60 00
	1 " 120	" "	60 00
	1 " 121	" "	60 00
	1 " 122	" "	60 00
	1 " 123	" "	60 00
	1 " 124	" "	60 00
	1 " 125	" "	60 00
	1 " 126	" "	60 00
	1 " 127	" "	60 00
	1 " 128	" "	60 00
	1 " 129	" "	60 00
	1 " 130	" "	60 00
85			
	1 " 131	" "	60 00
	1 " 132	" "	60 00
	1 " 133	" "	60 00
	1 " 134	" "	60 00
	1 " 135	" "	60 00
	1 " 136	" "	60 00

No. of bond.	No. of coupon.	When delivered by tax collector.	Amount.
1 of bond	137	October 12, 1870	60 00
1	" 138	" "	60 00
1	" 139	" "	60 00
1	" 140	" "	60 00
1	" 141	" "	60 00
1	" 142	" "	60 00
1	" 143	" "	60 00
1	" 144	" "	60 00
1	" 145	" "	60 00
1	" 146	" "	60 00
1	" 147	" "	60 00
1	" 148	" "	60 00
1	" 149	" "	60 00
1	" 150	" "	60 00
1	" 151	" "	60 00
1	" 152	" "	60 00
1	" 153	" "	60 00
1	" 154	" "	60 00
1	" 155	" "	60 00
1	" 156	" "	60 00
1	" 157	" "	60 00
1	" 158	" "	60 00
1	" 159	" "	60 00
1	" 160	" "	60 00
1	" 161	" "	60 00
1	" 162	" "	60 00
86			
1	" 163	" "	60 00
1	" 164	" "	60 00
1	" 165	" "	60 00
1	" 166	" "	60 00
1	" 167	" "	60 00
1	" 168	" "	60 00
1	" 169	" "	60 00
1	" 170	" "	60 00
1	" 171	" "	60 00
1	" 172	" "	60 00
1	" 173	" "	60 00
1	" 174	" "	60 00
1	" 175	" "	60 00
1	" 176	" "	60 00
1	" 177	" "	60 00
1	" 178	" "	60 00
1	" 179	" "	60 00
1	" 180	" "	60 00
1	" 181	" "	60 00
1	" 182	" "	60 00
1	" 183	" "	60 00
1	" 184	" "	60 00

No. of bond.	No. of coupon.	When delivered by tax collector.	Amount.
	1 of bond 185	October 12, 1870	60 00
	1 " 186	" "	60 00
	1 " 187	" "	60 00
	1 " 188	" "	60 00
	1 " 189	" "	60 00
	1 " 190	" "	60 00
	1 " 191	" "	60 00
	1 " 192	" "	60 00
	1 " 193	" "	60 00
	1 " 194	" "	60 00
87			
	1 " 195	" "	60 00
	1 " 196	" "	60 00
	1 " 197	" "	60 00
	1 " 198	" "	60 00
	1 " 199	" "	60 00
	1 " 200	" "	60 00
	1 " 201	" "	60 00
	1 " 202	" "	60 00
	1 " 203	" "	60 00
	1 " 204	" "	60 00
	1 " 205	" "	60 00
	1 " 206	" "	60 00
	1 " 207	" "	60 00
	1 " 208	" "	60 00
	1 " 209	" "	60 00
	1 " 210	" "	60 00
	1 " 211	" "	60 00
	1 " 212	" "	60 00
	1 " 213	" "	60 00
	1 " 214	" "	60 00
	1 " 215	" "	60 00
	1 " 216	" "	60 00
	1 " 217	" "	60 00
	1 " 218	" "	60 00
	1 " 219	" "	60 00
	1 " 220	" "	60 00
	1 " 221	" "	60 00
	1 " 222	" "	60 00
	1 " 223	" "	60 00
	1 " 224	" "	60 00
	1 " 225	" "	60 00
	1 " 226	" "	60 00
88			
	1 " 227	" "	60 00
	1 " 228	" "	60 00
	1 " 229	" "	60 00
	1 " 230	" "	60 00
	1 " 231	" "	60 00

No. of bond.	No. of coupon.	When delivered by tax collector.	Amount.
1	of bond 232	October 12, 1870	60 00
1	" 233	" "	60 00
1	" 234	" "	60 00
1	" 235	" "	60 00
1	" 236	" "	60 00
1	" 237	" "	60 00
1	" 238	" "	60 00
1	" 239	" "	60 00
1	" 240	" "	60 00
1	" 241	" "	60 00
1	" 242	" "	60 00
1	" 243	" "	60 00
1	" 244	" "	60 00
1	" 245	" "	60 00
1	" 246	" "	60 00
1	" 247	" "	60 00
1	" 248	" "	60 00
1	" 249	" "	60 00
1	" 250	" "	60 00
1	" 251	" "	60 00
1	" 252	" "	60 00
1	" 253	" "	60 00
1	" 254	" "	60 00
1	" 255	" "	60 00
1	" 256	" "	60 00
1	" 257	" "	60 00
1	" 258	" "	60 00
89			
1	" 259	" "	60 00
1	" 260	" "	60 00
1	" 261	" "	60 00
1	" 262	" "	60 00
1	" 263	" "	60 00
1	" 264	" "	60 00
1	" 265	" "	60 00
1	" 266	" "	60 00
1	" 267	" "	60 00
1	" 268	" "	60 00
1	" 269	" "	60 00
1	" 270	" "	60 00
1	" 271	" "	60 00
1	" 272	" "	60 00
1	" 273	" "	60 00
1	" 274	" "	60 00
1	" 275	" "	60 00
1	" 276	" "	60 00
1	" 277	" "	60 00
1	" 278	" "	60 00
1	" 279	" "	60 00

No. of bond.	No. of coupon.	When delivered by tax collector.	Amount.
1	of bond 280	October 12, 1870	60 00
1	" 281	" "	60 00
1	" 282	" "	60 00
1	" 283	" "	60 00
1	" 284	" "	60 00
1	" 285	" "	60 00
1	" 286	" "	60 00
1	" 287	" "	60 00
1	" 288	" "	60 00
1	" 289	" "	60 00
1	" 290	" "	60 00
90			
1	" 291	" "	60 00
1	" 292	" "	60 00
1	" 293	" "	60 00
1	" 294	" "	60 00
1	" 295	" "	60 00
1	" 296	" "	60 00
1	" 297	" "	60 00
1	" 298	" "	60 00
1	" 299	" "	60 00
1	" 300	" "	60 00
			$109,220 00

All of which is respectfully submitted.

JAMES REILLY,
County Court Clerk.

Which said report was received and ordered to be spread on the minutes; and it appearing that the foregoing report was acted upon on the 8th day of July, and the clerk neglected to make the proper entry, it is ordered that this entry shall be *nunc pro tunc.*

Minute Book G, pages 380–387.

And on Wednesday, July 3, 1872, one of the days of the July term, 1872, of the said quarterly court—present, Esquire Thomas C. Bleckley, chairman, and Esquires Witherington, Murray, Ligon, Giles, Hall, Spelman, Winters, Moncrief, Sneed, Wallace, Pulliam, Caldwell, Brewer, Herring, Harrell, Allen, Walker, Jones, Holeman, Buntyn, Hoegel, Brown, Elliott, Miller, Glisson, Brooks, Massey, H. C.; Massey, Jeremiah, and Stone, associate justices—the
91 statement of the canceled Mississippi River railroad bonds and coupons was, on motion, referred to the county attorney.

Entered, Book G, page 330.

And on Friday, July 12, 1872, one of the days of the July term, 1872, of said court—present, Esquire Thomas C. Bleckley, chairman, and Esquires Witherington, Murray, Ligon, Giles, Hall, Spelman, Winters, Moncrief, Sneed, Wallace, Pulliam, Caldwell, Herring, Allen, Irby, Walker, Jones, Holeman, Hoegel, Brown, Elliott, Mil-

ler, Glisson, and Brooks, associate justices—the following entry appears of record, to wit:

Ordered by the court, That the following rates of taxation be adopted for the year 1872:

County tax, 40c. on $100 worth of property.
Bridge tax, 5c. on $100 worth property.
School tax, 10c. on $100 worth property.
Selma railroad tax, 30c. on $100 worth property.
Miss. River R. R. tax, 15c. on $100 worth property.
Memphis & Ohio R. R. coupon tax, 10c. on $100 worth property.
State tax, 40c. on $100 worth property.
Judgment tax, 10c. on $100 worth property.
Dog tax, $2 on each taxable dog.
Polls, same as State tax.
Entered, Book G, page 406.

92 And on Wednesday, January 8th, 1873, one of the days of the January term, 1873, of said quarterly court—present, Esquire Thomas C. Bleckley, chairman, and Esquires Witherington, Murray, Spelman, Winters, Moncrief, Sneed, Wallace, Caldwell, Brewer, Herring, Harrell, Allen, Walker, Jones, Holman, Hoegel, Brown, Elliott, Hall, Miller, Brooks, Massey, H. C.; Massey, Jeremiah, and Stone, associate justices—the following entry appears of record, to wit:

Whereas this county holds the certificate of three hundred thousand dollars of the capital stock in the Mississippi River Railway Company; and whereas since the issuance of the certificates the said Mississippi River Railway Company has consolidated with the Paducah and Gulf Railroad Company, under which act of consolidation the company hitherto known as the Mississippi River Railway Company becomes an integral part of the Paducah & Memphis Railroad Company:

It is therefore ordered, That the said certificates of stock in the Mississippi River Railway Company be surrendered to the Paducah and Memphis Railroad Company on the condition that said Paducah and Memphis Railroad Company issue to the County of Shelby certificates for stock in the Paducah and Memphis Railroad Company in lieu of the certificates for stock in the Mississippi River Railroad Company, and that the clerk of this court be directed to surrender the said certificates of the county and receive the certificates for a like amount in the capital stock of the Paducah and Memphis Railroad Company.

Entered, Book G, page 578.

93 The following report was submitted to the court:

To the honorable county court of Shelby County:

Your clerk respectfully begs leave to make the following report of the aggregate amount of taxable property in Shelby County, and the taxes due thereon for the year 1872:

* * * * * * *

Total real and personal property	$38,248,694 64
Total value of capital invested in merchandise	3,729,811 00
* * * * * * *	
Mississippi River R. R. tax @ 15c. on $100	$62,967 75
* * * * * * *	

All of which is respectfully submitted.
January 1st, 1873.

JAMES REILLY *Clerk.*

Which said report was, on motion, ordered to be received and spread on the minutes.
Entered, Book G, page 585.

And on Friday, January 10th, 1873, one of the days of the January term, 1873, of the quarterly court of Shelby County—present, Esquire Thomas C. Bleckley, chairman, and Esqs. Witherington, Duncan, Spelman, Winters, Moncrief, Sneed, Wallace, Pulliam, Caldwell, Brewer, Herring, Irby, Walker, Jones, Holman, Hoegel, Brown, Elliott, Hall, Miller, Brooks, Massey, H. C., and Stone, associate justices—the following entry appears of record, to wit:

Ordered by the court, That Wm. Wallace be, and he is hereby, appointed to cast the vote representing the stock of Shelby
94 County in the meeting of the stockholders of the Paducah and Memphis Railroad Company, to be holden in the city of Memphis, January 11th, 1873.
Entered, Book G, page 608.

And on Monday, January 13th, 1873, one of the days of said January term, 1873—present, Esquire Thomas C. Bleckley, chairman, and a quorum of justices—the following entry appears of record, to wit:

Ordered, That the date inserted in the order authorizing Esquire Wm. Wallace to cast the vote of Shelby County at a meeting of the directors and stockholders of the Paducah and Memphis Railroad Company, be changed from the 11th day of January, 1873, to the 11th of February, 1873.
Entered, Book H, page 3.

And on Tuesday, April 8th, 1873, one of the days of the April term, 1873, of said court—present and presiding, Esquire Thomas C. Bleckley, chairman; also present, Esquires Witherington, Murray, York, Ligon, Duncan, Spelman, Winters, Moncrief, Sneed, Wallace, Pulliam, Caldwell, Brewer, Herring, Irby, Walker, Jones, Holman, Buntyn, Hoegel, Brown, Holst, Brooks, Massey, H. C.; Massey, Jeremiah, and Stone, associate justices—the following appears of record, to wit:

The report of James Reilly, clerk of the county court, show-
95 ing the amount of Mississippi River railroad bonds delivered to him and canceled to March 29th, 1873 ($142,772.49), including amount reported at a former term of this court, was, on motion, received and ordered to be filed.
Minute Book H, page 63.

And on Thursday, July 10, 1873, one of the days of the July term, 1873, of said court—present, Esquire Thomas C. Bleckley, chairman, and a quorum of justices—the following entry appears of record, to wit:

The following report was submitted to the court:

The committee to whom was referred the matter of recommending a rate of taxation to be levied for the year 1873, for railroads and other county purposes, respectively suggest the following rates, to wit:

* * * * * * *

Miss. River R. R. bond tax, 20c. per $100.

* * * * * * *

WM. WALLACE.
TOM HOLMAN, JR.
ELIJAH PULLIAM.

Which said report was, on motion, received and adopted, and it is ordered that the said assessment as recommended be levied for the current year.

Ayes—Esquires Duncan, Giles, Spelman, Winters, Moncrief, Sneed, Wallace, Pulliam, Caldwell, Allen, Walker, Jones, Holman, Buntyn, Hoegel, Brown, Holst, Brooks, and Stone—19.

Entered, Book H, page 162.

And on same day, Thursday, July 10, 1873, the following entry appears of record:

96 The following report of the receipts and disbursements of Shelby County for the six months ending June 30th, 1873, was submitted to the court:

Receipts.

* * * * * * *

Amount of Miss. River R. R. tax	$48,664 15

* * * * * * *

The following bonds and coupons issued by the County of Shelby fell due during this period:

50 Mississippi River R. R. bonds, due Jan. 1, 1873	$50,000
Coupons (Miss. River R. R.), due Jan. 1, 1873	18,000

* * * * * * *

The county will have to raise the following amounts during the ensuing twelve months:

On Jan. 1, 1874, Mississippi River R. R. bonds	$50,000
" " " " " " coupons	18,000
Total Mississippi River railroad	$68,000

* * * * * * *

Respectfully submitted.

JAMES REILLY, *Clerk.*

Which said report was, on motion, received and ordered to be spread upon the minutes.

Minute Book H, pages 162, 163, 164.

And on Wednesday, November 19, 1873, one of the days of the October term, 1873—present, Esquire Thomas C. Bleckley, chairman, and a quorum of justices—the following entry appears of record:

97 *Report of James Reilly, County Court Clerk.*

OFFICE COUNTY COURT CLERK,
MEMPHIS, *Nov.* 17, 1873.

To the worshipful county court of Shelby County, Tenn.:

May it please your worships, I have the honor herewith to present to you a tabular statement exhibiting the value of taxable property in each of the seventeen civil districts of the county, with the rate of taxation, and the the tax computed for the State, and the various taxes levied for general and special county purposes.

* * * * * * *

Total valuation ---------- $42,814,996

* * * * * * *

For Miss. R. R. tax @ 20 ---------- $85,629 99

* * * * * * *

Respectfully submitted.

JAMES REILLY,
County Court Clerk.

Which said report is ordered to be received and spread upon the minutes.

Entered, Book H, page 255.

And on Tuesday, January 20, 1874, one of the days of the January term, 1874, of said court—present and presiding, Thomas Holman, Jr., chairman; also present, Esquires Giles, Hammontree, Sneed, Wallace, Pulliam, Herring, Walker, Jones, Buntyn, Hoegel, Brown, Elliott, Thompson, Brooks, Massey, H. C., and Stone, associate justices—when the following proceedings, among others,
98 were had, viz.

The following report was filed:

* * * * * * *

Receipts for the year ending December 31st, 1872.

* * * * * * *

Miss. River R. R. tax ---------- $56,709 57

* * * * * * *

The following bonds and coupons fell due during the year:

50 Miss. River R. R. bonds, due Jan. 1, 1873 ---------- $50,000
" " " coupons, " " " ---------- 9,000

* * * * * * *

JAMES REILLY, *Clerk.*

Book H, pages 379–381.

And on Friday, April 10, 1874, one of the days of the April term, 1874, of said quarterly court—present, Esquire Tom Holman, Jr., chairman, and a quorum of justices—the following entry appears of record, to wit:

We, the committee appointed to examine the report of W. W. McDowell, attorney for the county, and to report on the same, beg leave to state that they have carefully examined and considered the same, and we fully endorse all the essential provisions of said report, and in order to put the same into effect we recommend the adoption of the following orders, viz:

It is ordered by the court that the rate of taxation for the year 1874, for county and railroad purposes, be fixed as follows, viz:

* * * * * *

Mississippi River railroad tax, on each $100 of assessed property, 15 cents.

* * * * * * *

Ayes—Esquires Douglass, Hammontree, Spelman, Winters,
99 Moncrief, Sneed, Wallace, Caldwell, Allen, Irby, Walker, Jones, Elliott, Thompson, Miller, Holst, Brooks, Massey, H. C., and Stone—19.

Entered, Book H, page 433.

And on Thursday, October 8th, 1874, one of the days of the October term, 1874, of said quarterly court—present, Esquire Tom Holman, Jr., chairman, and a quorum of the justices—the following entry appears of record:

Report of James Reilly, Clerk.

To the honorable county court of Shelby County:

Your clerk respectfully begs to submit the following report, showing the aggregate of all the taxes levied by the county for all purposes for the year 1874:

* * * * * * *

Total value of real and personal property..... $37,584,693

* * * * * * *

Mississippi River R. R. tax, 15c. on the $100.... 56,377 03½

* * * * * * *

Respectfully submitted.

JAMES REILLY, *Clerk.*

Entered, Book I, page 31.

And on Monday, April 12th, 1875, one of the days of the April term, 1875, of said court—present and presiding, Esquire Tom Holman, Jr., chairman; also present, Esquires York, Murray, Hunter, Douglass, Giles, Hammontree, Spelman, Winters, Quigley, Moncrief,
Sneed, Coleman, Pulliam, Caldwell, Brewer, Fletcher, Allen,
100 Fleming, Irby, Harrell, Jones, Hoegel, Elliott, Thompson, Miller, Egnew, Brooks, Massey, Jeremiah, and Stone—29—the following appears of record:

Financial Condition of Shelby County, Tennessee, April 1st, 1875.

Debits.

Mississippi River R. R. bonds and coupons $100,768 00

* * * * * * *

Credits.

Amount of uncollected taxes for 1874:

Mississippi River R. R. tax $33,089 70

Report approved by the court and ordered to be spread upon the minutes.

Minutes I, 200, 201.

And on Monday, April 24th, 1876, one of the days of the April term, 1876, of said court—present and presiding, Esquire Tom Holman, Jr., chairman; also present, Esquires York, Murray, Douglass, Hammontree, Winters, Quigley, Sneed, Pulliam, Irby, Harrell, Walker, Hoegel, Thompson, Miller, brooks, and Stone—16—the following entry appears of record, to wit:

Receipts of Shelby County, Tenn., for 1875. County Revenue.

* * * * * * *

Mississippi River R. R. tax $42,280 80

* * * * * * *

101 *Financial Condition of Shelby County on January, 1876.*

Dr.

Mississippi River R. R. bonds and coupons outstanding .. $99,928 00

* * * * * * *

Cr.

James Reilly—amount Mississippi River R. R. funds in his hands enjoined 14,636 84

* * * * * * *

A. E. FRANKLAND.

Mississippi River R. R. tax $19,638 57

Minute Book I, 547–549.

And on Thursday, April 5th, 1877, one of the days of the April term, 1877, of said court—present and presiding, Esquire Tom Holman, Jr., chairman; also present, Esquires Murray, Crockett, Quigley, Harrison, Coleman, Caldwell, Allen, Ellis, Lewis, Hoegel, Elliott, Egnew, Jones, S. H., Ramsey, and Elam, associate justices—the following appears of record, to wit:

Financial Condition of Shelby County.

Assets.

* * * * * * *

James Reilly, receiver Mississippi River R. R. tax $3,782 85

* * * * * * *

Debits.

* * * * * * *

Mississippi River R. R. bonds and coupons outstanding--$76,368 00

* * * * * * *

Minute Book J, page 267.

102 And on Wednesday, April 10th, 1878, one of the days of the April term, 1878, of said court—present and presiding, Esquire Tom Holman, Jr., chairman; also present, Esquires Murray, Hunter, Hammontree, Crockett, Quigley, Winters, Harrison, Coleman, Caldwell, Wellborne, Abingdon, Harrell, Ellis, Lewis, Hoegel, Elliott, Egnew, Jones, S. H., Ramsey, and Elam, associate justices—the following entry appears of record, to wit:

Financial Condition of Shelby County, Tennessee, April 1st, 1878.

Liabilities.

Mississippi River R. R. bonds and coupons outstanding--$70,308 00

* * * * * * *

Assets.

James Reilly, account Mississippi River R. R. tax------ $248 38

* * * * * * *

Minutes J, page 490.

And on Friday, April 18th, 1879, one of the days of the April term, 1879, of said court—present and presiding, Esquire Tom Holman, Jr., chairman; also Associate Justices Murray, Crockett, Quigley, Winters, Alexander, Pryor, Kimbrough, Bledsoe, Hoegel, Elliott, Egnew, Mason, Stone, and Elam—14—the following appears of record, to wit:

103 *Financial Condition of Shelby County, April 1st*, 1879.

* * * * * * *

Liabilities.

* * * * * * *

Mississippi River R. R. bonds and coupons ..------ ----$69,648 00

* * * * * * *

Minutes K, page 203.

And on Monday, April 12, 1880, one of the days of the April term, 1880, of said court—present, Esquire Tom Holman, Jr., chairman, and a quorum of justices—the following entry appears of record, to wit:

The committee to whom was referred the matter of the rate of county and special taxes for the year 1880 respectfully suggest the following as the rates to be fixed:

* * * * * * *

In reference to the proposition to levy a tax of 10 cents on the $100 of taxable property to meet the bonds issued to the Mississippi

River railroad, to be paid out upon the conditions annexed, a majority of your committee recommend that the same be done.

Respectfully,

S. HAMMONTREE.
P. M. WINTERS.

We, a majority of the committee, recommend that no levy be made on account of said bonds to the Miss. River Railroad Company, believing as we do that such a levy would be unwise, unjust, and illegal.

Respectfully,

TOM. HOLMAN, JR.
B. C. BLEDSOE.

104 Whereupon the following order was presented to the court:

It is ordered, That an assessment of ten cents on the one hundred dollars of taxable property in Shelby County be levied for the purpose of discharging any liability of the county on the subscription of stock to the Mississippi River Railway Company, the same, when collected, to be paid out by the trustee on warrants drawn by the chairman of this court to the persons entitled thereto.

Provided, That this assessment shall not be placed in the hands of the trustee for collection until the engineer of the Memphis, Paducah and Northern Railroad Company shall certify to the chairman of this court that the entire unfinished portion of the railroad from Memphis to Paducah is under contract for construction: And provided further, That no part of said tax shall be paid on the warrant of the chairman of this court until the said railroad is completed and trains are actually running thereon from Paducah to Memphis: And provided further, That no part of said taxes to be paid until the chairman of this court has received stock in the Memphis, Paducah and Northern Railroad Company amounting to three hundred thousand dollars: And provided further, That it is hereby distinctly understood and declared that the action of this court in making said assessments is not to be taken as evidence of a ratification of the original subscription to the Mississippi River Railway Company or to be used in any manner whatever in any suit now pending or that may hereafter be pending on said subscription.

Which order was rejected by the following vote:

Ayes—Douglass, Hammontree, Winters, Alexander, Coleman, Kimbrough, Egnew, and Mason—8.

105 Noes—Hunter, Moffett, Herring, Gowen, Jones, Allen, Bledsoe, Harrell, Holman, Elliott, and Elam—11.

Whereupon it was moved to reconsider the vote refusing to levy 10c. tax for Mississippi River railroad bonds, which motion was carried by the following vote:

Ayes—Hunter, Douglass, Hammontree, Moffett, Alexander, Gowen, Kimbrough, Holman, Elliott, Egnew, and Mason—11.

Noes—Herring, Jones, Allen, Bledsoe, Elam—5.

It is ordered, That an assessment of ten cents on the one hundred dollars of taxable property in Shelby County be levied for the pur-

pose of discharging in full all liability of the county on the subscription of stock to the Mississippi River Railway Company, the same, when collected, to be paid out by the trustee on warrants drawn by the chairman of this court to the persons entitled thereto: Provided, That before any steps are taken to collect the tax hereby levied all the holders of bonds issued in payment of said subscription, and now unpaid, shall stipulate in writing that they will accept this assessment, together with the unpaid taxes heretofore assessed for the same purpose, in full satisfaction of all liability on account of said subscription, and file the same with the chairman of this court: And provided further, That this assessment shall not be placed in the hands of the trustee for collection until the engineer of the Memphis, Paducah & Northern Railroad Company shall certify to the chairman of this court that the entire unfinished portion of the railroad from Memphis to Paducah is under contract for construction: And provided further, That no part of said tax shall be paid on the warrant of the chairman of this court until the said railroad is
106 completed and trains are actually running thereon from Paducah to Memphis: And provided further, That no part of said tax is to be paid until the chairman of this court has received stock in the Memphis, Paducah & Northern Railroad Company amounting to three hundred thousand dollars: And provided further, That it is hereby distinctly understood and declared that the action of this court in making said assessment is not to be taken as evidence of a ratification of the original subscription to the Mississippi River Railway Company, or to be used in any manner whatever in any suit now pending or that may be hereafter pending on said subscription: And provided further, That nothing herein shall preclude this court from correcting assessments heretofore made.

Which order was adopted by the following vote:

Ayes—Hunter, Douglass, Hammontree, Moffett, Winters, Alexander, Gowen, Kimbrough, Holman, Elliott, Egnew, Mason—12.

Noes—Herring, Jones, Allen, Bledsoe, Elam—5.

Entered, Book K, pages 485–487.

And on Tuesday, October 11th, 1881, one of the days of the October term, 1881, of said court—present, Esquire Tom Holman, Jr., chairman, and a quorum of justices—the following entry appears of record, to wit:

Whereas it is now certain that the Memphis, Paducah and Northern railroad, as a part of the corporation known as the Chesapeake, Ohio and Southwestern, and Chesapeake and Ohio, will be
107 completed within less than twelve months, and that it will thus become a portion of an important trunk line; and

Whereas in the present condition of matters the county is in danger of losing altogether the stock which it subscribed to the original enterprise, which by changes and successive sales has become a part of the trunk lines above named; and

Whereas the county can now secure, as it is believed, $100,000 of stock in the corporation known as the Chesapeake, Ohio and Southwestern Railroad Company, provided a satisfactory arrangement is

made with the holders of the bonds issued to the Mississippi River Railroad Company, purporting to be the bonds of the county;

In view of which facts, taken in connection with recent decisions of the supreme court of the State of Tennessee bearing upon the right of the holders of said bonds to enforce the same—

Be it ordered that B. C. Bledsoe, P. M. Winters, and A. D. Hunter, members of this court, to which the county attorney and the hon. chairman of this court are added, and Amos Woodruff, S. H. Dunscomb, J. T. Fargason, J. T. Pettit, and R. D. Goodwyn, citizens of Shelby County, are hereby appointed a committee for the purpose of negotiating a settlement of said bonds, and obtaining a valid title to $100,000 of stock in said Chesapeake, Ohio and Southwestern Railroad Company, and that said committee report to the present term, if practicable, and, if not, to the next quarterly court.

Entered, Book L, page 204.

108 Quarterly Court of Shelby County. January Term, 1882.

WEDNESDAY, *Jan'y 4th*, 1882.

The quarterly court of Shelby County, Tennessee, met pursuant to adjournment—present and presiding, the Hon. C. E. Smith; also present the following associate justices: Murray, York, Williams, Hines, Winter, Gowan, Kimbrough, Wellborne, Rittenhouse, Allen, Callis, Holman, Fleming, Slaughter, Elam, Prior, and Shelton—when the following proceedings were had:

Ordered by the court, That the committee heretofore appointed to meet and confer with the Chesapeake & Ohio R. R. Co. in reference to the settlement and compromise of suits on bonds, now pending in the circuit court of the United States, be continued.

Ordered further, That the clerk notify each of said committee to meet at the law library, at 11 o'clock a. m. on Saturday next, to consult and endeavor to agree upon some final action to be taken by the court, and that they be requested to report on next Monday.

Shelby Co. Quarterly Court. Jan'y Term, 1882.

MONDAY, *Jan'y* 9, 1882.

The quarterly court of Shelby Co. met pursuant to adjournment—present and presiding, the Hon. C. E. Smith; also present the following associate justices: Murray, Williams, Hines, Spelman, Quigley,
Winters, Prior, Coleman, Gowan, Kimbrough, Welbourne,
109 Rittenhouse, Allen, Bledsoe, Callis, Holeman, Fleming, Egnew,
Slaughter, Ramsey, and Elam—when the following proceedings were had:

Whereas it appears to the court that Eckstein Norton has brought suit against Shelby County, in the circuit court of the United States for the western district of Tennessee, at Memphis, on about eighty-two bonds issued by the county commissioners of Shelby County to the Mississippi River railroad, claiming that said county is liable on said bonds, which this court, as the representative of Shelby County, deny; and whereas a proposition of compromise has been made to this court by said Eckstein Norton, through his attorneys,

Gnatt & Patterson, to compromise said suits and claim, and said proposition of compromise has been, by this court, referred to a committee composed of prominent citizens of said county; and whereas said committee have examined the proposition of compromise offered as aforesaid, and also the various questions involved, and a majority of said committee have made their report in favor of the county's affecting the terms of compromise offered in substance, which is in words and figures as follows, to wit:

To the hon. county court of Shelby County:

We, your committee, to whom was referred the proposition of compromise of suits of Eckstein Norton on bonds issued by the county commissioners, have considered the matter thoroughly, and in view of the doubtful nature of the defense we would recommend the acceptance of the following proposition which has been offered as a compromise: That twenty thousand dollars be deducted from the bonds and interest; that the cash now in the hands of the
110 county court clerk, collected on assessments to pay said bonds, be applied to the further reduction of the amount claimed, and that for the balance the county issue new bonds with coupons attached, at six per cent., said bonds — maturity in ten annual installments.

That the bonds so issued be by the chairman paid to the holders of the old bonds upon their delivery of same to him, or that he dispose of them upon the market, if he can obtain above par value for them, and in that event he apply the proceeds to the payment and redemption of said bonds.

Respectfully submitted.

R. D. GOODWYN.
A. WOODRUFF.
S. H. DUNSCOMB.
JNO. T. FARGASON.
J. T. PETTIT.
TOM HOLEMAN, JR.
JULIUS A. TAYLOR.
A. D. HUNTER.

Memphis, Tenn., Jan'y 7th, 1882.

And whereas a minority of said committee have made separate reports, differing from the majority and from each other, and it appearing to the court, from a due consideration of all the reports, together with the facts in the case, that the defense of Shelby County to the said suits is doubtful, and so considered by said committee; and it further appearing that said committee have recommended a compromise of said claim and suits:

Now, therefore, in consideration of the premises, and after a full consideration and discussion of the whole matter, this court,
111 not admitting the validity of said bonds sued on or the liability of Shelby County thereon, either legally or equitably, but hereby expressly denying the same in every sense, nevertheless, in view of the recommendations of said committee, in whose opin-

ion the defense of Shelby County is doubtful, do hereby order, adjudge, and decree that the county accept the offer of compromise, or will accept the same when agreed to by the said Ex. Norton, as modified by this decree, to wit:

The county will admit her indebtedness as to the balance on said bonds and interest, after deducting from the total of same the sum of twenty thousand dollars, and this sum so ascertained shall be the exact sum admitted to be due said Norton, and no more.

Upon said agreement by said Ex. Norton the chairman will proceed with all convenient haste to ascertain the whole amount, both principal and interest, and, after deducting the twenty thousand dollars, as aforesaid, shall cause to be paid over to the said Ex. Norton, or his solicitors of record, the sum of money now in the hands of the county court clerk collected on account of said bonds, and take up a sufficient amount of said bonds to cover the same, at their estimated value, according to this decree.

When said payment is made he shall deduct the same from the balance of said claim, after first deducting the twenty thousand dollars, and ascertain the net balance of said claim.

When the net balance is so ascertained it shall be the duty of the chairman and clerk of this court to issue the bonds of Shelby County, payable in ten years and redeemable at the pleasure of the county, after January 1st, 1887.

112 Twenty-five thousand dollars (or fifty) of said bonds shall be in the sum of five hundred dollars each, and the balance of said bonds shall be in the sum of one thousand dollars each, and no bond shall be for a fractional part of five hundred or of one thousand dollars. Said bonds shall have coupons attached, and shall bear interest at the rate of six per cent. per annum, payable semi-annually; shall be properly numbered, and shall be signed by the chairman of this court, and countersigned by the clerk of the county court, who shall attach to each bond his seal of office; and said bonds, before sold or delivered, shall be registered in a well-bound book kept for that purpose in the office of the clerk of this court, and also a duplicate in the office of the chairman of this court, giving the number of the bond, the date of issue, on what account issued, the amount of bond, when payable, to whom issued, and such other description as the chairman and clerk may deem necessary or important. When said bonds are so issued, it shall be the duty of the chairman and financial agent to endeavor to sell the whole or any part of said bonds at the best price obtainable at par value, and if he can sell them above par shall do so, and immediately apply the proceeds to the liquidation of the balance of the said indebtedness left unpaid, or so much as the funds in his hands will discharge, taking receipts therefor. Should he, however, be unable to sell the same above par, within sixty days after the bonds are issued, (which time he shall have to negotiate the same,) he shall, at the earliest practical moment, pay over and deliver said bonds at par to the said Ex. Norton, or his solicitors of record, who shall receive them at par, and at the time take a full receipt

113 for said sum, which shall be recorded in the office of the

clerk of the county court, and shall also take up the bonds now held and sued on by said Ex. Norton.

Upon receipt of any of the bonds herein provided to be compromised the chairman shall immediately write across the face of each bond so received the word "canceled," and sign his name underneath, as chairman, and shall retain all said bonds so received and canceled, and make report to the next succeeding term of the quarterly court his acts and doings in the premises. But it is distinctly understood that this is only a compromise, and is not intended to be binding on the county, unless the said Ex. Norton shall agree to the same in full, and carry out its terms in good faith; and the acceptance of any money or bonds as provided for, or under this decree, shall forever estop him from denying the validity or binding force as to him, and the acceptance of the same by him, and the carrying out of the terms of this decree by him, shall forever estop the county from denying its liability on the bonds to be issued under the terms of this decree, this decree being intended as a full and final compromise, settlement, and estoppel to both the said Ex. Norton or the holders of said bonds sued on and of Shelby County.

And now comes Ex. Norton, by his attorneys, Gantt & Patterson, who presented the offer of compromise to this court, for and in the name of the said Extein Norton, who, in open court, and by his signature hereto, signed by them as his attorneys, do hereby announce to the court that he, said Ex. Norton, accepts and agrees to the terms of the foregoing decree, and further agrees and binds himself, upon its passage and final entry of record in this
114 court, that he will cause to be dismissed the said suits now pending against Shelby County, referred to in this decree.

ECKSTEIN NORTON,
By GANTT & PATTERSON,
His Attorneys.

Which order was passed by the following vote:

Ayes—Spelman, Prior, Gowan, Kimbrough, Holman, Fleming, Egnew, Slaughter, Ramsey, Elam—10.

Noes—Murray, Hines, Winters, Wellborne, Rittenhouse, Allen, Bledsoe, Callis—8.

Entered, Minute Book L, 247, &c.

Shelby Co. Quarterly Court. Jan'y Term, 1882.

TUESDAY, *Jan'y* 17, 1882.

The quarterly court of Shelby County met pursuant to adjournment—present and presiding, the Hon. C. E. Smith; also present the following associate justices: York, Williams, Hines, Moffatt, Spelman, Winters, Alexander, Prior, Coleman, Gowan, Kimbrough, Welbourne, Rittenhouse, Bledsoe, Callis, Holman, Fleming, Jennings, Slaughter, Elam—when the following proceedings were had:

In re Compromise of Miss. River R. R. Bonds.

On motion, the action of this court on Jan'y 9th, 1882, in accepting the proposition of Ex. Norton as to a compromise with him for

the Miss. River R. R. bonds now held by him, was reconsidered by the following vote:

Ayes—York, Williams, Hines, Moffatt, Winters, Prior, Coleman, Gowan, Kimbrough, Welbourne, Rittenhouse, Bledsoe, Callis, Jennings, Elam—15. Noes—none.

115 *In re* Compromise of Miss. River R. R. Bonds.

On motion of Esquires B. C. Bledsoe, the minority report of the committee to whom was referred the matter of compromise, which is in the words and figures, as follows:

The undersigned dissent from the majority report upon certain propositions of the Chesapeake & Ohio R. R., believing that the judicial determination of the county's liability to pay the bonds should first be had, and hence would report that the proposition be rejected and the suit in court be resisted.

B. C. BLEDSOE.
P. M. WINTERS.

Which was adopted by the following vote:

Ayes—York, Williams, Spelman, Winters, Prior, Coleman, Gowan, Kimbrough, Welbourne, Rittenhouse, Bledsoe, Callis, Jennings, Elam—15.

Noes—none.

L, 272.

Shelby Co. Quarterly Court. Jan'y Term, 1882.

WEDNESDAY, *Jan'y* 18, 1882.

The quarterly court of Shelby Co., Tenn., met pursuant to adjournment—present and presiding, the Hon. C. E. Smith; also present the following associate justices: York, Williams, Hines, Spelman, Winters, Prior, Kimbrough, Rittenhouse, Bledsoe, Fleming, Jennings, Slaughter, and Galloway—when the following proceedings were had:

* * * * * * *

The question as to proper decree to be drawn in reference to Miss. River R. R. matter was, on motion, referred to the att'y gen'l and county attorney.

Book L, 279.

116 In the matter of the proposition of compromise heretofore presented and submitted to this court by Eckstein Norton, by his attorneys, Messrs. Gantt and Patterson, the terms of which said proposition of compromise were to compromise the certain suits heretofore commenced by the said Eckstein Norton against the County of Shelby on eighty-two bonds issued by Barbour Lewis, president of the board of county commissioners, and which said proposition to compromise said suits on said bonds was passed upon by this court at a former day of this present January term, 1882, on, to wit, the 9th day of January, 1882.

On the 11th day of January, 1882, the same being one of the days of the present January term, 1882, of this court, Tom Holman, Jr.,

Esquire, being one of the regularly commissioned magistrates of said County of Shelby at the time, and then and there a member of this court, who had on the said 9th day of January, 1882, it being one of the days of the present January term, 1882, of said court, voted in favor of the acceptance by the County of Shelby of the terms of compromise, as aforesaid, gave notice that he would on Monday, the 16th day of January, 1882, the same being one of the days of the present January term, 1882, of said court, move a reconsideration of the vote of this court, taken as aforesaid, on said proposition of compromise, as aforesaid, as the same had been modified and recommended by the majority report of the committee of the court to whom the same had been referred; and the said motion to reconsider said vote having been accordingly made by the said Tom Holman, Jr., Esquire, on Monday, the 16th day of January, 1882, the same being one of the days of the present January term, 1882, of this court, B. J. Kimbrough, Esquire, one of the duly com-
117 missioned magistrates of Shelby County, and at the time a member of the said county court, requested that W. B. Glisson, county attorney of Shelby County, give the court his official legal opinion touching the legal liability of the County of Shelby on the bonds sued on by Eckstein Norton, and that this opinion be read to the court before the taking of a vote on the motion to reconsider, as aforesaid; and the said county attorney, having appeared before the court, gave his official legal opinion, declaring said bonds null and void and creating no liability against Shelby County, and that this court had no legal right to make or accept the proposed or any other compromise touching said bonds, and that the action of the court on the said 9th day of January, 1882, in presuming or pretending to accept the terms of the compromise, as aforesaid, was wholly without authority of law.

Whereupon it was agreed by the court, and so announced, that it would hear argument of counsel for and against the motion to reconsider, and that all questions as to the merits of the case ought to be discussed.

Attorney General G. P. M. Turner, on behalf of the people of Shelby County, first addressed the court in favor of the motion to reconsider being adopted. He was followed by Col. Geo. Gantt, in opposition to the motion to reconsider.

Col. Casey Young, Judge A. Wright, Major W. P. Wilson, and Minor Meriwether made arguments in favor of the motion to reconsider.

Col. Josiah Patterson, Judge R. J. Morgan, Gen'l W. Y. C. Humes, and D. H. Poston also addressed the court in opposition to the
118 motion to reconsider the former action of the court, and the whole question being presented to the court, for and against the motion to reconsider, the previous question was called, and the question before the court was, Shall the motion to reconsider the action of the court, as aforesaid, on the said 9th day of January, 1882, be reconsidered or not? And, the ayes and nays being called, Esquires York, Williams, Hines, Moffatt, Winters, Prior, Coleman, Gowan, Kimbrough, Welbourne, Rittenhouse, Bledsoe, Callis, Jen-

nings, and Elam voted in favor of the reconsideration, and there was no vote against the reconsideration.

Whereupon the chairman of the court announced that the motion to reconsider had prevailed, and that the same should be so entered.

Thereupon Esquire B. C. Bledsoe, one of the magistrates of Shelby County, and a member of said court, moved that the minority report of the committee, to whom had been referred the motion of the compromise as aforesaid, be adopted; which report was as follows:

The undersigned dissent from the majority report upon certain propositions of the Chesapeake & Ohio R. R., believing that the judicial determination of the county's liability to pay the bonds should first be had, and hence would report that the proposition be rejected and the suit in court be resisted.

B. C. BLEDSOE.
P. M. WINTERS.

The question of whether the minority report as aforesaid should or should not be adopted was put by the chairman of the court, on the 17th day of January, 1882, the same being one of the days of the said January term, 1882, of said court, and, the ayes and noes being called, the following magistrates voted aye, to wit:

119 York, Williams, Hines, Spelman, Winters, Prior, Coleman, Gowan, Kimbrough, Welbourne, Rittenhouse, Bledsoe, Callis, Jennings, and Elam.

And, there being no vote against the same, the chairman announced that the said minority report had been by the court adopted, and directed that the same be so entered. All which was accordingly done.

Entered, L, 283, '4, and '5.

STATE OF TENNESSEE, *Shelby County:*

I, Owen Dwyer, clerk of the county court of said county, do hereby certify that the foregoing pages contain a complete transcript of all the orders made by the board of county commissioners, and by the quarterly court of Shelby County, in reference to the issuance of bonds and coupons by Barbour Lewis, president of the board of county commissioners, in the name of Shelby County, Tennessee, down to the April term, 1882, of said quarterly court, as the same appears of record in my office.

Given under my hand and seal of office, at office, this 27 day of May, A. D. 1882.

[Seal County Court, Shelby Co., Tenn.]

OWEN DWYER,
Clerk County Court of Shelby County,
By LOUIS KETTMANN, *D. C.*

In Circuit Court of the United States, at Memphis.

EX. NORTON
vs.
SHELBY COUNTY. } 2637.

Bond and Coupon Register.

Date of bond.	Coupon No.	By whom issued.	On what account issued.	Where payable.	When due.	Am't bond or coupon.	No. bond.
March 1, 1869	2	Shelby County	Miss. River R. R. Co.	City of Memphis	Jan'y 1, 1871	$60	63
March 1, 1869	2	"	" "	" "	"	60	101
March 1, 1869	2	"	" "	" "	"	60	102
March 1, 1869	2	"	" "	" "	"	60	103
March 1, 1869	2	"	" "	" "	"	60	104
March 1, 1869	2	"	" "	" "	"	60	105
March 1, 1869	4	"	" "	" "	"	60	106
March 1, 1869	2	"	" "	" "	Jan'y 1, 1873	60	161
March 1, 1869	2	"	" "	" "	Jan'y 1, 1871	60	164
March 1, 1869	2	"	" "	" "	"	60	165
March 1, 1869	2	"	" "	" "	"	60	166
March 1, 1869	2	"	" "	" "	"	60	167
March 1, 1869	2	"	" "	" "	"	60	168
March 1, 1869	2	"	" "	" "	"	60	169
March 1, 1869	2	"	" "	" "	"	60	170
March 1, 1869	2	"	" "	" "	"	60	171
March 1, 1869	2	"	" "	" "	"	60	172

March 1, 1869	2	"		"	"		"	"		"	60	173
March 1, 1869	2	"		"	"		"	"		"	60	174
March 1, 1869		"		"	"		"	"		Jan'y 1, 1873	1,000	175
March 1, 1869	2	"		"	"		"	"		Jan'y 1, 1871	60	175
121												
March 1, 1869		"		"	"		"	"		Jan'y 1, 1873	1,000	176
March 1, 1869		"		"	"		"	"		"	1,000	177
March 1, 1869		"		"	"		"	"		"	1,000	178
March 1, 1869		"		"	"		"	"		"	1,000	179
March 1, 1869		"		"	"		"	"		"	1,000	180
March 1, 1869		"		"	"		"	"		"	1,000	181
March 1, 1869		"		"	"		"	"		"	1,000	182
March 1, 1869		"		"	"		"	"		"	1,000	183
March 1, 1869		"		"	"		"	"		"	1,000	184
March 1, 1869		"		"	"		"	"		"	1,000	185
March 1, 1869		"		"	"		"	"		"	1,000	186
March 1, 1869		"		"	"		"	"		"	1,000	187
March 1, 1869		"		"	"		"	"		"	1,000	188
March 1, 1869		"		"	"		"	"		"	1,000	189
March 1, 1869		"		"	"		"	"		"	1,000	190
March 1, 1869		"		"	"		"	"		"	1,000	191
March 1, 1869		"		"	"		"	"		"	1,000	192
March 1, 1869		"		"	"		"	"		"	1,000	193
March 1, 1869		"		"	"		"	"		"	1,000	194
March 1, 1869		"		"	"		"	"		"	1,000	195
March 1, 1869		"		"	"		"	"		"	1,000	196
March 1, 1869		"		"	"		"	"		"	1,000	198
March 1, 1869		"		"	"		"	"		"	1,000	199
122												
March 1, 1869		"		"	"		"	"		"	1,000	200
March 1, 1869	2	"		"	"		"	"		Jan'y 1, 1871	60	201
March 1, 1869		"		"	"		"	"		Jan'y 1, 1874	1,000	214
March 1, 1869		"		"	"		"	"		"	1,000	215
March 1, 1869		"		"	"		"	"		"	1,000	216
March 1, 1869		"		"	"		"	"		"	1,000	217
March 1, 1869		"		"	"		"	"		"	1,000	218
March 1, 1869		"		"	"		"	"		"	1,000	219

Bond and Coupon Register—Continued.

Date of bond.	Coupon No.	By whom issued.	On what account issued.	Where payable.	When due	Am't bond or coupon.	No. bond.
March 1, 1869	---	Shelby County	Miss. River R. R. Co.	City of Memphis	Jan'y 1, 1874	$1,000	220
March 1, 1869	---	"	" "	" "	"	1,000	221
March 1, 1869	---	"	" "	" "	"	1,000	222
March 1, 1869	---	"	" "	" "	"	1,000	223
March 1, 1869	---	"	" "	" "	"	1,000	224
March 1, 1869	---	"	" "	" "	"	1,000	225
March 1, 1869	---	"	" "	" "	"	1,000	226
March 1, 1869	---	"	" "	" "	"	1,000	227
March 1, 1869	---	"	" "	" "	"	1,000	228
March 1, 1869	---	"	" "	" "	"	1,000	229
March 1, 1869	---	"	" "	" "	"	1,000	230
March 1, 1869	---	"	" "	" "	"	1,000	231
March 1, 1869	---	"	" "	" "	"	1,000	232
March 1, 1869	---	"	" "	" "	"	1,000	236
March 1, 1869	---	"	" "	" "	"	1,000	237
March 1, 1869	---	"	" "	" "	"	1,000	238
March 1, 1869	---	"	" "	" "	"	1,000	239
March 1, 1869	---	"	" "	" "	"	1,000	240
March 1, 1869	---	"	" "	" "	"	1,000	241
March 1, 1869	---	"	" "	" "	"	1,000	242
123							
March 1, 1869	---	"	" "	" "	"	$1,000	243
March 1, 1869	---	"	" "	" "	"	1,000	244
March 1, 1869	---	"	" "	" "	"	1,000	245
March 1, 1869	---	"	" "	" "	"	1,000	246
March 1, 1869	---	"	" "	" "	"	1,000	247
March 1, 1869	---	"	" "	" "	"	1,000	248
March 1, 1869	---	"	" "	" "	"	1,000	249

March 1, 1869		"		"	"		"	"		"	1,000	250
March 1, 1869	6	"		"	"		"	"		Jan'y 1, 1875	60	251
March 1, 1869	6	"		"	"		"	"		"	60	252
March 1, 1869	6	"		"	"		"	"		"	60	253
March 1, 1869	6	"		"	"		"	"		"	60	254
March 1, 1869	6	"		"	"		"	"		"	60	255
March 1, 1869		"		"	"		"	"		"	1,000	263
March 1, 1869	6	"		"	"		"	"		"	60	263
March 1, 1869		"		"	"		"	"		"	1,000	264
March 1, 1869	6	"		"	"		"	"		"	60	264
March 1, 1869		"		"	"		"	"		"	1,000	265
March 1, 1869	6	"		"	"		"	"		"	60	265
March 1, 1869		"		"	"		"	"		"	1,000	271
March 1, 1869		"		"	"		"	"		"	1,000	272
March 1, 1869		"		"	"		"	"		"	1,000	273
March 1, 1869		"		"	"		"	"		"	1,000	274
124												
March 1, 1869		"		"	"		"	"		"	1,000	275
March 1, 1869		"		"	"		"	"		"	1,000	276
March 1, 1869		"		"	"		"	"		"	1,000	277
March 1, 1869		"		"	"		"	"		"	1,000	278
March 1, 1869		"		"	"		"	"		"	1,000	279
March 1, 1869		"		"	"		"	"		"	1,000	280
March 1, 1869		"		"	"		"	"		"	1,000	281
March 1, 1869		"		"	"		"	"		"	1,000	282
March 1, 1869		"		"	"		"	"		"	1,000	283
March 1, 1869		"		"	"		"	"		"	1,000	284
March 1, 1869		"		"	"		"	"		"	1,000	285
March 1, 1869	2	"		"	"		"	"		Jan'y 1, 1871	60	288
March 1, 1869	2	"		"	"		"	"		"	60	289
March 1, 1869		"		"	"		"	"		Jan'y 1, 1875	1,000	290
March 1, 1869	2	"		"	"		"	"		Jan'y 1, 1871	60	290
March 1, 1869		"		"	"		"	"		Jan'y 1, 1875	1,000	291
March 1, 1869	2	"		"	"		"	"		Jan'y 1, 1871	60	291
March 1, 1869		"		"	"		"	"		Jan'y 1, 1875	1,000	292
March 1, 1869	2	"		"	"		"	"		Jan'y 1, 1871	60	292
March 1, 1869		"		"	"		"	"		Jan'y 1, 1875	1,000	293
March 1, 1869	2	"		"	"		"	"		Jan'y 1, 1871	60	293

Bond and Coupon Register—Continued.

Date of bond.	Coupon No.	By whom issued.	On what account issued.	Where payable.	When due.	Am't bond or coupon.	No. bond.
March 1, 1869	----	Shelby County	Miss. River R. R. Co.	City of Memphis	Jan'y 1, 1875	$1,000	294
March 1, 1869	2	"	" "	" "	Jan'y 1, 1871	60	294
March 1, 1869	----	"	" "	" "	Jan'y 1, 1875	1,000	295
March 1, 1869	2	"	" "	" "	Jan'y 1, 1871	60	295
March 1, 1869	----	"	" "	" "	Jan'y 1, 1875	1,000	296
March 1, 1869	2	"	" "	" "	Jan'y 1, 1871	60	296
March 1, 1869	----	"	" "	" "	Jan'y 1, 1875	1,000	297
125							
March 1, 1869	2	"	" "	" "	Jan'y 1, 1871	60	297
March 1, 1869	----	"	" "	" "	Jan'y 1, 1875	1,000	298
March 1, 1869	2	"	" "	" "	Jan'y 1, 1871	60	298
March 1, 1869	----	"	" "	" "	Jan'y 1, 1875	1,000	299
March 1, 1869	2	"	" "	" "	Jan'y 1, 1871	60	299
March 1, 1869	----	"	" "	" "	Jan'y 1, 1875	1,000	300
March 1, 1869	2	"	" "	" "	Jan'y 1, 1871	60	300

STATE OF TENNESSEE, *Shelby County:*

I, Owen Dwyer, clerk of the county court of Shelby County, do hereby certify that I am the custodian of the register of bonds and coupons issued by Barbour Lewis, president of the board of county commissioners, in the name of Shelby County, Tennessee, and that the foregoing is a full and correct statement of all the bonds and coupons issued as aforesaid to the Mississippi River Railroad Company which are unpaid and outstanding, as the same appears of record on said register, the balance of said bonds and coupons having been paid, taken up, and canceled by said county, as the same appears of record on said register.

Given under my hand and seal, at Memphis, this 27 day of May, A. D. 1882.

[Seal County Court, Shelby Co., Tenn.]

OWEN DWYER,
Clerk County Court of Shelby County,
By LOUIS KETTMANN, *D. C.*

126 3. Plaintiff then offered the deposition of Extein Norton, plaintiff, to which defendant objected, on the grounds that said deposition was irrelevant and incompetent, which objection was overruled by the court and the deposition admitted, which is in words and figures as follows, to wit:

In Circuit Court of United States for Western District of Tennessee, at Memphis.

EXSTEIN NORTON *vs.* SHELBY COUNTY, TENN.

Interrogatories and cross-interrogatories to be propounded to Exstein Norton (witness for the plaintiff), a resident of the State of New York, to be read on behalf of the plaintiff on the trial of the cause, all formality of caption and certificate waived, and only exceptions for competency and relevancy being reserved.

HUMES & POSTON,
Attorneys for Plaintiff.
W. B. GLISSON,
Att'y for Shelby Co., Tenn.

May 9, 1882.

On this 18th day of May, A. D. 1882, EX. NORTON, of lawful age, being first duly sworn to testify the truth, the whole truth, and nothing but the truth, in answer to the several interrogatories hereto annexed and propounded to him in the above-entitled cause makes answer to the said several interrogatories as follows, viz:

Interrogatory 1st by plaintiff's attorneys. State your age and present residence, and what connection are you to the plaintiff.

Ans. I am fifty years of age; I reside in New Brighton, Richmond county, New York; I am plaintiff in this suit and in two other suits against the same defendant, pending in the same court, to enforce the payment of bonds issued by the defendant in aid of the Mississippi River R. R. Co.

127 Interrogatory 2d by same. If you should state you are the plaintiff in this and the other two suits which are dependent upon it, please state what connection, if any, you have ever had with the Mississippi River Railroad Company, or any company with which it was connected or consolidated. If yea, when did such connection begin and end, and what was your connection therewith?

Ans. I was at one time president and a director of the Mississippi River Railroad Company; became such about 1870; I resigned, I think, my position as president in the latter part of 1870; I was the president of the Paducah and Gulf Railroad Company in 1869, and from that time up to the date of the consolidation of said Paducah and Gulf Railroad Company with the Mississippi River Railroad Company. After the consolidation the new company was called the Paducah and Memphis Railroad Company; I was elected president of the latter company about the time of the consolidation; I think I continued to be president until said road was sold under foreclosure in 1875 or 1876.

Interrogatory 3d by same. Did you or not ever, at any time, go

before the county court of Shelby County, Tennessee, in reference to the payment of the bonds issued by it to the Mississippi River Railroad? If yea, state when it was, what your object was at the time in going before that court, what interest at the time you represented, if any, and what was said and done by you and the county court of Shelby county.

Ans. I did go before the county court of Shelby County, Tennessee, at the October term of that court, in 1871, in reference to
128 the bonds issued to the Mississippi River Railroad Company.

In the summer of the year 1871 proposals by the Mississippi River Railroad Company were made to the Paducah and Gulf Railroad Company for a consolidation of the properties, franchises, and assets of the two corporations. My object in going before the county court of Shelby County was to ascertain if the bonds and coupons would be paid as they matured and if there was any question in regard to them. The interest that I represented at that time was that of the Paducah and Gulf Railroad Company, being president of that corporation and the owner of four-tenths of all its stock, and my brothers owned about three-tenths. I stated to the court the facts as to said pending proposals for the consolidation of the two railroad companies' properties, franchises, and assets; that I was an owner of a large portion of said Paducah and Gulf Railroad Company's properties, franchises, and assets; that the said Paducah and Gulf Railroad Company was a completed line of railroad, extending from Paducah, Ky., to Troy Station, now Reeves, in Obion county, Tennessee, a distance of about sixty-three miles; that the road was completed and equipped, and was in active operation, and was unincumbered and clear of debt. I distinctly stated to the court that before putting my property and the property of others in such consolidation with the Mississippi River Railroad Company I wished to know definitely what that county wanted to do as to the bonds issued by it to said Mississippi River Railroad Company, as those bonds constituted a large part of the assets of the Mississippi River Railroad Company. I also said positively to that court at that time that if there was any doubt about that county paying said
bonds I wanted to know it, and that in that case I would
129 oppose the proposed consolidation; that I did not intend to put the Paducah and Gulf Railroad Company into the consolidation without these bonds were to be paid, and that as I was one of the principal owners in the said Paducah and Gulf road, owning four-tenths thereof, the consolidation would not be made without my consent. There was some discussion between the members of the court as to the building of the line of road, and Esquire Walker made some point as to the faithful application of the moneys to be paid by the county of Shelby in work on the road. Before I left the court-room the court, by a vote, I think, of twenty-three ayes to seven noes, adopted an order levying a tax to meet the next maturing installment of these bonds and interest, and I was assured by many members of the court that the whole would be paid. They seemed anxious to have the consolidation effected and the road

completed. The only apprehension manifested by any person was that the moneys paid would not be spent on the work of the road.

Interrogatory 4th by same. If in answer to the above you should state anything about any consolidation of any railroad of which you were an officer, and interested in, please state what it was, what representations were made by you and the county, and what, if any, assurances were made to you of the county's intention to pay or reject payment of the bonds so issued by it to the Mississippi River Railroad Company.

Ans. I made the representations and statements to the county court which I have set forth in my answer to the third interrogatory, and I received from the county court the assurances or reply which I have set forth in said answer. Nothing was said at the county court, or by any of its members, as to the bonds being
130 invalid, nor anything in regard to the existence of an intention to refuse the payment of these bonds. I had never heard of any such intention on the part of the county. I had heard that they voted a tax levy to pay some of the bonds and had then rescinded it; and one object I had in view in appearing before the court was to ascertain if they intended at that time to make provision in the tax levy for the payment of such bonds and interests as would then become due. This I stated to the county court in my answer to this and the previous interrogatory. I have stated in substance what was said and done at the meeting of the county court satisfied me that the bonds would be paid. No one raised any question as to the validity of the bonds.

Interrogatory 5th by same. What was the condition of your railroad at date of this interview, if such you say occurred; was it or not complete or incomplete, in debt or out of debt, and what was your object in going before the said county court?

Ans. The railroad in which I was specially interested—the Paducah and Gulf railroad—at the date of the interview above specified; that road was built and in running order from Paducah to Troy Station (now called Reeves Station), a distance of about sixty-three miles, completed, equipped, and in active operation and out of debt, and my object in going before the county court was to make sure that these Shelby County bonds issued to the Mississippi River Railroad Company, which were to be a part of the property of the new corporation if the consolidation was had, were of any value and would be paid as they matured. These Shelby County bonds con-
stituted a large part of the assets of the Mississippi River
131 Railroad Company, and the county was a large holder of stock of that corporation; and I also wanted to have the county fully understand the plan of consolidation which had been proposed.

Interrogatory 6th by same. What effect had such interview upon your action, and what, if anything, was done to show good faith upon the part of defendant?

Ans. The effect produced upon me was to satisfy me that there was no objection to the payment of the bonds and that they would be paid, and that the consolidation was approved by the county

court. At a subsequent meeting of the stockholders of the Paducah and Gulf railroad I reported what had occurred, as stated above, at my meeting with the county court, and the stockholders of the Paducah and Gulf railroad approved the plan of consolidation. I considered the levying of the tax to pay the maturing bonds and interest was an evidence of good faith on the part of Shelby County, and the subsequent return of its stock in the Mississippi River Railroad Company and its acceptance of the stock of the consolidated corporation, its voting its stock in favor of the consolidation, was also evidence of its good faith. I voted in favor of the consolidation, as did my brothers, to whom I stated what had happened in my interview with the county court. This neither of us would have done had the action of the Shelby County court or the vote of the county on its stock been the reverse of what they were.

Interrogatory 7th. If, in answer to the foregoing questions, you should answer that the proposition was to consolidate the Mississippi River Railroad Company with the Paducah and Gulf Railroad Company, then please state what was the then condition of the
132 Mississippi River Railroad Company, finished or unfinished. If unfinished, to what extent, and what assets had it?

Ans. At this time the Mississippi River Railroad Company had done but little work on its line, none of which was completed. It had spent less than $150,000 in the work of building its line, and the only assets of the Mississippi River Railroad Company good for any amount or of any real value were certain bonds issued in payment of subscriptions of stock by municipalities thereto. Among these were about 250 bonds of Shelby County, for one thousand dollars each. The said county had issued $300,000 in bonds, but had paid some bonds and interests before this time. These Shelby County bonds were a large part of the assets of the Mississippi River railroad.

Interrogatory 8th by same. If you say any consolidation took place, please state the name of the new corporation. And was such consolidation effected with or without the knowledge or consent of defendant, Shelby County; what part, if any, did Shelby County take in consummating such consolidation?

Ans. The consolidation was effected. The name of the new corporation was Paducah and Memphis Railroad Company. The consolidation was effected with the knowledge of the defendant, Shelby County. Shelby County owned $300,000 of stock of the Mississippi River Railroad Company, and that county voted on all of its stock in favor of the consolidation.

Interrogatory 9th by same. Has or not Shelby County ever had issued to it stock in either the Mississippi River Railroad Company or the Paducah and Memphis Railroad Company; if yea, for what amount, whether in one or both companies?

133 Ans. Before the consolidation took place Shelby County owned $300,000 of stock of the Mississippi River Railroad Company. After the consolidation took place Shelby County returned its said Mississippi River railroad stock to the new corpora-

tion and received in exchange therefor $300,000 in stock of the Paducah and Memphis Railroad Company.

Interrogatory 10th by same. Has, or not, Shelby County, the defendant, ever voted its stock in either the Mississippi River railroad or the consolidated Paducah and Memphis Railroad Company, and has it ever or not offered to surrender it, and has it ever been actually surrendered, or does it yet retain such stock? If you should say it has voted its said stock in the meetings of either company, state how often.

Ans. Shelby County voted on its stock in Mississippi River Railroad Company for the consolidation; said county voted on the stock of the Paducah and Memphis Railroad Company, issued to it in exchange for that issued to the Mississippi River Railroad Company. It never offered to surrender the stock in the Paducah and Memphis Railroad Company while I continued the president of that corporation, and it has never been actually surrendered. It still owns such stock so far as I know. My impressions are that Shelby County voted on its stock in all the meetings of the stockholders of the Paducah and Memphis Railroad Company—three or four times at least.

Interrogatory 11th by same. Was, or not, your purchase of the bonds sued on herein before or after the date of the inter-
134 view detailed above, when the County of Shelby expressly agreed to the consolidation and to pay all of its said bonds?

Ans. The bonds sued on in this action were purchased by me after my interview with the Shelby County court and after the consolidation of the said two corporations and before maturity.

Interrogatory 12th by same. At the date of the consolidation and the occasion you speak of, when you appeared before the county court of defendant county and made the enquiry and was assured of the validity of the bonds and the prompt payment of the same, how much work had been done along the line of the Mississippi River railroad? And state as near as you can the total amount expended on said road in Shelby County down to the present time.

Ans. Before the consolidation the proposed line of the Mississippi River Railroad Company was about one hundred and fifteen miles long; no portion of the line had been completed. I think less than $150,000 worth of work had been done on it. After the consolidation the road was completed from Memphis to Covington, a distance of thirty-seven miles. The grading was nearly completed some fifteen miles north of Covington. The road was also completed from Troy Station, or Reeves, Obion county, Tenn., to Trimble Station, fifteen miles south, and was graded and bridged and the ties secured from Trimble Station to about one mile south of Dyersburg, a distance of about twenty miles. The line was located from that point to near Ripley, Tennessee, and the right of way nearly all secured. The road was completed through the whole of Shelby County—I think about twenty-one miles—in July, 1873, and trains have been
135 running regularly between Covington and Memphis since that date. The amount expended in Shelby County, I think, is over $350,000, probably over $400,000.

Interrogatory 13th by same. Has or not said county ever paid to you or others interest or the principal of said bonds; if yea, how much has been paid to you and how many of said bonds to other parties?

Ans. No company has paid me any of these bonds or any interest on them. I suppose the word "company" should be "county," in the thirteenth interrogatory. I say that at the time I purchased these bonds sued on herein I purchased other bonds of said issue. The county has paid me more than $20,000 of such bonds and the interest coupons on all of these bonds that I purchased, except the few that are included in this suit. I know that the county paid a large number of these bonds at different times to other holders than myself, and I think that all of these $300,000 are paid, save those included in these suits.

Interrogatory 14th by same. What portion of said road in Shelby County remains incomplete; or, if complete, for what length of time has it been completed; and are or not trains, passenger and freight, daily passing over the same?

Ans. No portion of the road in Shelby County remains incomplete. It was all done in July, 1873, and equipped, and passenger and freight trains have been regularly run over it ever since.

Interrogatory 15th by same. Please state any other facts that may be to the interest of the plaintiff that you may know, as fully as if specially interrogated in regard thereto.

136 Ans. I should not have voted for the consolidation of the two roads, nor should I have purchased the bonds in suit, had not the Shelby County court taken the action I have related, and assured me, as I understood it, in the interview which I have described, that the bonds were valid, and would be paid as they matured. Nor would the consolidation have taken place if the action of the county court had been other than what it was.

EX. NORTON.

Defendant reserves all exceptions as to the competency and relevancy of the questions above and the answers thereto, and waives cross-examination.

W. B. GLISSON AND
G. P. M. TURNER,
Attorneys for Shelby County.

137 The foregoing deposition was taken before me as stated in the caption, and reduced to writing by E. J. Bunker, a clerk in my office and a disinterested person, not of kin or counsel to any of the parties to the before-mentioned cause, nor interested in the result of said suit. Said deposition was reduced to writing in my presence and under my direction, and in the presence of the said witness.

I further certify that I am not interested in the before-mentioned cause, neither am I of kin or counsel to either of the parties to said cause. I further certify that I sealed up the said deposition and delivered it to the express company in the city of New York for trans-

portation without being out of my possession, or altered after the same was taken.

In witness whereof I have hereunto set my hand and affixed my notarial seal, at the city of New York, in the State of New York, on this 18th day of May, A. D. 1882.

[SEAL.] CHARLES NETTLETON,
Notary Public for New York Co., in N. Y.

Endorsed: Received by express sealed; opened at request of D. H. Poston, and filed May 22, 1882. Bell W. Etheridge, clerk. W. B. Weisiger, D. C. $10.50 paid by plaintiff.

138 4. Plaintiff here offered the deposition of W. W. McDowell, which was objected to by defendant's counsel upon the same grounds as that of Extein Norton's, and said objection was likewise overruled, and the deposition was admitted by the court in words and figures as follows, to wit:

In Circuit Court of United States for the Western Division of West Tennessee, at Memphis.

EX. NORTON *vs.* SHELBY COUNTY.

Deposition of W. W. McDowell, witness for plaintiff in the above and other causes consolidated therewith, taken in the presence of Humes & Poston, attorneys for plaintiff, and Wm. B. Glisson, for defendant, and which it is agreed may be read as plaintiff's testimony on the trial of the cause, subject to all proper exceptions for competency and relevancy.

HUMES & POSTON,
Attorneys for Plaintiff.

——— ———,
Attorney for Defendant, Shelby County.

Question 1st by plaintiff's attorney. State your age, and where you resided in 1871, and what your avocation then and now is.

Ans. I am — years of age. In 1871 I was a practicing attorney for Shelby County, and then and now reside in Memphis, and am at present the chancellor of the chancery court of this county.

Question 2d by same. Are you acquainted with the plaintiff; and, if yea, for what length of time?

Ans. I am; have known him for the past ten or twelve years.

139 Question 3d by same. Please state whether or not you were present at the October term, 1871, of the quarterly court of Shelby County; if yea, please state whether or not the plaintiff appeared before that court and made any statement or enquiry of that court or the members thereof regarding certain bonds issued by defendant county in aid of the Mississippi River Railroad Company and certain stocks held by defendant county in that company. If yea, state all that was said and done, either by the plaintiff or said quarterly county court of defendant or the members thereof.

Ans. I was county attorney for Shelby County in 1871, and as such was nearly always present when any question of importance was

brought before the quarterly terms of the county court of said county. At the October term, 1871, of said court, which was a quarterly term, Ex. Norton, the plaintiff in the above-named suit, came before that court and asked the privilege of making a statement to it, which was granted, when he stated that he and his brothers owned a controlling interest in a railroad then called the Paducah and Gulf Railroad Company, which was then completed from Paducah to Troy Station. He stated the distance, but I do not remember it. He also stated that it was free from incumbrance, and that he was the president of it. He further stated to the court that negotiations were pending to consolidate said road with the Mississippi River Railroad Company, and that he and his associates were willing to consolidate their road with the Mississippi River railroad, which then existed only on paper, and whose assets consisted chiefly of the county subscriptions along the line of the road, provided Shelby County would continue to make the levies of taxes to meet
140 her bonds, then amounting to $250,000 or thereabouts; but he stated to the court in very emphatic terms that he and his associates would not go into such a consolidation unless said bonds were to be paid, and the suspended tax which had been levied at the previous April term and suspended at the July term was then relieved, which, if done, he would take as an assurance upon the part of the court and county that provision would be made to meet the bonds and coupons as they matured. There was much discussion between the members of the court, and questions to and replies from Norton; and Esq. W. H. Walker took strong grounds against recognizing the bonds or levying a tax. After which Mr. Norton again stated that while he desired to make the consolidation and then proceed with the building of the road from Memphis toward the terminus of his road at Troy Station, yet he desired the court to fully understand that no consolidation would be made unless the county would at once make provision for the payment of remaining outstanding bonds which had been issued in the name of the county to the Mississippi River Railroad Company, and the county take stock in the consolidated road in lieu and in place of that held by it in the Mississippi River Railroad Company. After a further interchange of views a motion was made to relevy a tax for the year 1871 to pay the accrued interest and past-due bonds or bonds soon to mature and become due, when the following order was made:

"Ordered, That the order of the court made at the July term, 1871, suspending the collection of the tax levied to pay the subscription of Shelby County to the capital stock of the Mississippi River Railroad Company, be, and the same is hereby, rescinded, and
141 the tax collector is hereby instructed to proceed with the collection of said tax of fifteen cents on the hundred dollars as already assessed, and that when collected the same shall be held subject to be paid over to the parties entitled to receive it, on the order of the chairman of the court whenever he shall have satisfactory evidence that the work on the road from Memphis to the north line of Shelby County is under contract and in process of construction, the money to be paid out only on the estimates of the chief engineer."

This order I see in the printed order of the court made in reference to said Mississippi River railroad matter, and is correct as I now remember it.

The order was made as an assurance to Mr. Norton of the purpose of the county, through its court, that provision would be made for the payment of said bonds as they matured.

And the consolidated company, called, I believe, the Paducah and Memphis Railroad Company, issued its stock to the County of Shelby in lieu of the stock in the old Mississippi River Railroad Company, which was accepted and voted by the County of Shelby. The facts as detailed above are substantially correct. I cannot, of course, give the exact language used by Mr. Norton when he made his statements to the court, but I have given the substance and import of what he said. I resided in Shelby County in 1871, and am and was then acquainted with the plaintiff.

Cross-examination:

The defendant expressly reserving all exceptions to the above and foregoing questions and answers, on the ground that the same is offered and has a tendency to explain and add to a record, and therefore is incompetent, proceeds to cross-examine:

142 Cross-ques. 1. What was the sentiment of the court previous to and up to the passage of the order you have copied above as of the October term, 1871? Was it favorable or unfavorable to said railroad?

Ans. My impression is that it was unfavorable prior to the statement of Norton as detailed above. I infer this from the fact that the order which had been made at the April term, 1871, was suspended or revoked at the following July term. From July until October the court was not in session, and I heard very little said on the subject, so far as I remember. But the chief objection all the time was to paying the subscription without getting any road, and, as far as I remember, the July order was induced by such consideration.

And further deponent saith not.

W. W. McDOWELL.

Subscribed and sworn to before me, May 18, 1882.

[SEAL.] F. P. POSTON,
Notary Public.

Filed May 20, 1882.

143 5. Plaintiff then introduced H. B. CULLEN as a witness, who testified as follows:

I have been for many years past deputy clerk of the county court of defendant. That the bond register of defendant showed that defendant, by its officers, had paid all the bonds and coupons except those shown by said register to be still outstanding, as shown on Exhibit "A" to plaintiff's replication herein, and that all had been paid since January 1st, 1870.

6. The plaintiff then called J. A. TAYLOR, who testified that he had been for six years consecutively, prior to 1882, the attorney of defendant; that during that time no question had been made, to his knowledge, by any tax-payer of defendant as to the tax levies to meet the instalments of said bonds falling due. No suit was brought, to his knowledge, to resist said taxes by any one or more tax-payers.

This is all the evidence of the plaintiff.

Defendant's Evidence.

144 1. Defendant then introduced JOHN LOAGUE, who testified as follows:

I was clerk of the county court of defendant from 1st of January, 1866, to the end of November, 1869, and after. Thomas Leonard was judge of the county court of defendant during all this time, and held his regular courts. As such judge he had a seal different from that impressed on the bonds here sued on. I signed those bonds and affixed the seal at the instance and under the direction of the county commissioners, and not of Judge Leonard. I attached the seal to said bonds as it was the seal kept by me as clerk of the county court. The county commissioners were appointed, qualified, and organized as required by the act of the Legislature creating the board of county commissioners of Shelby County, and took possession of the county court-room and records in
145 April, 1867, and held the same and exercised the functions devolving on the county court until November 15th, 1869, when the county court regained possession. The county quarterly court did not meet during that time. I was county clerk at that time, and recorded the proceedings of the board of county commissioners during the time said board so held.

2. D. M. WITHERINGTON was introduced by defendant and testified as follows:

I was a justice of the peace and member of the quarterly county court of Shelby County at its October term, 1871, and before and after that. I was present when Extein Norton appeared before the court and stated that the Miss. River R. R. and the Paducah and Gulf R. R. were about to consolidate. I do not remember distinctly what was said, but the record shows the result. There was great opposition to paying or assuming those bonds, but the members of the court were afraid that they would have to pay them.
146 Col. Gantt, Gen. Humes, and Mr. Norton all came before the court several times and urged the court to pay the bonds; said it would have to pay them. Judge McDowell, who was then county attorney, also advised us to pay.

3d. JAMES W. ALLEN was then introduced by the defendant and testified as follows:

I was a justice and member of the county quarterly court from its reorganization, November 15th, 1869, onward to the present time. I was present at the October term, 1871, when Extein Norton

and others came before it in reference to the consolidation. I cannot recollect distinctly what was said or done, except I know that there was great opposition in the court.

4. W. P. YORK, a witness for defendant, testified in substance the same as Witherington and Allen.

5. Defendant here introduced the original bill and record in the case of W. H. Walker *et als. vs.* J. E. Merriman *et als.*, in the
147 chancery court of Memphis, which is in words and figures as follows, to wit:

148 THE STATE OF TENNESSEE, upon the relation of W. H. Walker, R. N. Bond, D. M. Witherington, W. P. York, James Carroll, John C. Campbell, John C. Creighton, P. H. Heinrich, Andrew Stewart, F. Smith, Ira Moore, E. Pulliam, J. B. Mercer, H. C. Brewer, J. M. Thompson, D. A. Harrell, T. C. Blakely, H. T. Jones, Thomas Holman, David Hildebrand, W. S. Walton, S. A. Moore, James Hall, R. B. Miller, R. H. Glisson, C. C. Brooks, J. H. Goodlett, Jeremiah Massey, W. S. Smith, of Shelby County, Complainants,

vs.

JAMES E. MERRIMAN, BARBOUR LEWIS, W. H. WHITE, WILLIAM HACK, and F. W. LOUIS, of Shelby County, Defendants.

To the Hon. Wm. M. Smith, chancellor, &c., presiding in the chancery court of Memphis:

Humbly complaining, sheweth unto your hon.: Your ora-
149 tors and relators, who file this bill in the name of the State of Tennessee upon their relation, would shew unto your hon. that they are residents, freeholders, and citizens of the County of Shelby and State of Tennessee, and the owners of taxable real and personal property in said county, and have been for many years; they are also, all of them, justices of the peace in and for said county, duly and legally elected, commissioned, and qualified under the constitution and laws of Tennessee as such justices of the peace for said county, and the terms of office of complainants, respectively, is yet unexpired, and has considerable time yet to continue.

Complainants further show that since the election and qualification of complainants, respectively, as such justices they have continued to reside in their respective districts, and to discharge the duties and exercise the functions of justices of the peace, as by law they are required to do, and have, jointly with the other
150 qualified justices of the peace, held the regular terms of the quarterly court of said county until the present April term, 1867.

On the 1st Monday of April, 1867, the date to which they had adjourned at the last regular term of said quarterly court, complainants met at the court-house in Memphis, the proper place of holding the said court, to open and hold said term of said quarterly court, when and where they found defendants in possession of and occupying the court-house, assuming to hold said quarterly court, and

exercising the functions and powers unlawfully of complainants when assembled as such quarterly court.

Complainants further aver and charge that defendants illegally, and without authority of law, usurped the powers, functions, and privileges of the quarterly court aforesaid, and as such usurpers are illegally, and without authority of law, exercising the powers, functions, and privileges aforesaid.

151 Complainants further aver and charge that defendants have usurped the control and illegally, and without authority of law, taken into their custody and possession the records of the county court of Shelby County, Tennessee, and are every day making and entering orders in said records, as a quarterly session of the county court of said county alone is authorized to do in regular term time, under the constitution and laws of Tennessee, as complainants are advised and insist.

Complainants further charge that defendants have unlawfully usurped and are now illegally holding the office and exercising all the powers and discharging the duties vested in and performed by the quarterly court of said county, and also the other functions and powers specified in the 25th section of an act purporting to have been passed by the last General Assembly of Tennessee, and dated March 9th, 1867, a copy of which is hereto attached and marked Exhibit A, and prayed to be taken as part of this bill.

152 Complainants are advised and insist that said act is in violation of the constitution of the State of Tennessee in its provisions, and is not a legal and binding act nor the law of the land.

Complainants are advised and insist said act is in violation of the following provisions of the constitution: This act vests in the governor the power of appointing to office these five commissioners, whereas by the constitution of Tennessee the Legislature can only vest him with power to appoint in cases of vacancies occurring by death, resignation, or removal. Sec. —, Constitution of Tenn.; article —, sec. —, p. —, of the Code. Said act is in violation (p. 49) of sec. 8 of article 11th of the constitution, and (p. 39) sec. 29 of art. 2d of the same. Article 3d, sec. 3d, of the constitution vests the legislative authority of this State in a General Assembly, to consist of a senate and house of representatives, both dependent on the people. P. 36, article 11th, sec. 8. The Legislature is vested with power

153 to vest such powers in the courts of justice, with regard to private and local affairs, as may be deemed expedient. P. 49, article 2d, sec. 29. The General Assembly is vested with power to authorize the several counties and incorporated towns in this State to impose taxes for county and corporation purposes, &c.

Complainants are advised and insist that under these sections the Legislature can delegate legislative powers for local and private purposes, to wit, the power of taxation, and other powers for local and private purposes, in the courts of justice, but not elsewhere; and complainants aver that the history of the State Legislature, from the adoption of the amended constitution in 1834 to the present time, is in harmony with the requirements of these provisions, as they are

advised and believe, and without an instance to the contrary
154 legislation over the local affairs of the county, including taxation, roads, ferries, legitimation, *et cetera*, has been uniformly entrusted to the county courts at their quarterly sessions.

Complainants are advised and insist that this act under consideration is directly in violation of the constitution, therefore, in attempting to vest in this board of commissioners legislative powers as to the affairs of the county.

Complainants are also advised and insist that said act is (p. 49) in violation of sec. 7th, article 11, of the constitution, not being general in its provisions, but limited in its application to Shelby County alone, and having been passed, as complainants believe, for the benefit of the defendants particularly.

Complainants are also advised and insist that said act is in violation of sec. 4 (p. 45), article 7th, of the constitution, because it gives
155 the power of filling these county offices, in the first place, to the governor, whereas the Legislature can only direct the filling of vacancies that may happen by death, resignation, or removal by appointment.

Complainants are also advised and insist that said act is in violation of sec. 12th (p. 50), article 11th, of the constitution, and sec. 17th of article 1st (p. 33), inasmuch as it attempts to close the chancery court and present the remedy of injunction from being administered by that court to stay this usurpation, however clear the opinion of the court may be that it is an usurpation and an infringement of the constitution.

Complainants are advised and insist that said act violates sections 1st & 2d of article 7th of the constitution. The elections entrusted by these sections to the justices can only be made at the sessions of the quarterly court, as prescribed by the Code, sec. 4179, *et*
156 *seq.*; but this act prohibits the justices from ever hereafter holding a quarterly term, and devolves all the duties and vests all the powers of the justices, when presiding as a quarterly court, in the defendants as a board of county commissioners, thereby giving them the power to elect those officers, which by the constitution, can only be elected by the justices.

Complainants are advised and insist that said act never passed the senate or house of representatives as prescribed by sec. 18 of article 2d of the constitution; and indeed, as they are informed and believe, and as will be seen by a certified copy of the journals of both houses, hereto attached as Exhibit B, and prayed to be taken as part of this bill, said bill never passed any reading in either house of the General Assembly of Tennessee.

A bill was introduced into the senate to appoint additional justices and notaries public, and passed three readings and was sent
157 to the house, where it was passed on three readings, but amended by additional sections of 4, 5, 6, 7, & 8, and was thereupon returned to the senate for concurrence; and the question being simply one of concurrence or non-concurrence in the house amendment, or to perfect house amendments, additional sections, from 9 to 43, inclusive, embracing the municipal court and officers'

bill for Memphis, being wholly new and original matter, not pertaining in any way or germain to the subject-matter of the original bill or of house amendments, were offered as a pretended amendment to house amendment upon the question of concurrence or non-concurrence between the two houses, and after the bill had passed through all its readings in both houses and under the previous question without debate forced upon said house amendment, and sent back to the house for concurrence, and the
158 same was concurred in. Thus it would seem this pretended act never passed a reading in either house. It was, in fact, an original bill, not germain to the subject-matter of the first bill, and was not offered upon the passage of that bill upon any of its readings, but was offered after all the readings and upon a question of concurrence; and thus this extraordinary measure, in utter disregard of parliamentary law, the rules of the Legislature, and in flagrant violation of the constitutional provisions requiring that all bills shall be read one time upon three seperate days in each house, and without which no bill shall become a law, under the previous question, is made to assume the form and color of law. Complainants are advised and insist that is violate of other provisions of the constitution not herein set forth, and in other respects not alleged, and, therefore, void.

159 Complainants further allege that the usurpation aforesaid of defendants is a wrong and injury to complainants as citizens and tax-payers as aforesaid and as justices, depriving them of their rights and privileges, and is now and will inflict upon all the good citizens of the county illegally and wrongfully heavy and ruinous taxes and pecuniary charges and expenses, unless the defendants are restrained by the injunctive order of this honorable court. The premises considered, complainants pray that the persons named in the caption as defendants be made parties defendants to this bill by due process of law and required to answer every allegation of fact of this bill; and on final hearing complainants pray that the said act be declared void, and that the attempt by defendants to exercise the powers attempted to be conferred on them by said pretended act of and pertaining to the quarterly
160 court of this county be declared an usurpation, and that they be perpetually enjoined from the exercise of the powers attempted to be conferred by said act. In the mean time complainants pray an injunction to be issued by this hon. court restraining defendants from the further exercise of said usurped powers until the final hearing of this cause. Complainants pray for general relief and such other and further relief as may seem meet in the premises, and in accordance with justice and the powers of this court. This is the first application for an injunction in this case. As in duty bound complainants will ever pray, &c.

WRIGHT & McKISSICK,
GANTT & WADDELL,
YERGER & SALE,
MILLER & J. R. ROBINSON,
HUMES & MORGAN,
Sol's for Complainants.

STATE OF TENNESSEE, *Shelby County:*

161 Personally appeared before me, John C. Creighton, an acting justice of the peace in and for said county, R. B. Miller, who made oath in due form of law that the facts stated in the foregoing bill are true to the best of his knowledge and belief.

R. B. MILLER.

Sworn to and subscribed before me the 9th day of April, 1867.

JOHN C. CREIGHTON, *J. P.*

Endorsed: H. D. Final 3076. W. H. Walker *et al. vs.* James E. Merriman *et al.* Original bill. No. 1777, N. R. D. Filed 9th day of April, 1867. A. Alston, C. & M.

162 The State of Tennessee to the sheriff of Shelby county:

Summon James E. Merriman, Barbour Lewis, W. H. White, Wm. Hack, and F. W. Louis, if to be found in your county, to appear before the chancery court of Shelby County, at the court-house in Memphis, Tenn., on the second Monday in May, 1867, next, then and there to answer the bill of complaint of the State of Tennessee, in the relation of W. H. Walker, R. M. Bond, T. M. Witherington, W. P. York, James Carroll, John C. Creighton, P. H. Heinrich, Andrew Stewart, T. Smith, Ira Moore, E. Pulliam, J. B. Mercer, H. C. Prewitt, J. M. Thompson, D. A. Harrell, T. C. Blakely, H. T. Jones, Thomas Holman, and others, a copy of which accompanies this writ. Herein fail not, and have you then and there this writ.

Witness Auguston Alston, clerk and master of said court, at office in Memphis, this second Monday in November, 1867.

AUGUSTON ALSTON,
Clerk and Master,
By BENJ. COLEMAN,
D. C. &. M.

162½ [Endorsed:] No. 1777, N. R. D. In the chancery court of Shelby County. The State of Tennessee, in the relation of W. H. Walker *et als., vs.* James E. Merriman *et als.* Subpœna to answer. Issued 10th day of April, 1867. A. Alston, C. & M. Came to hand 10th day of April, 1867, and executed same day upon Jas. E. Merriman, Barbour Lewis, W. H. White, Wm. Hatch, and F. W. Louis. Gave copy of bill to Barbour Lewis. P. M. Winters, sh'ff. R. W. Bradford, S. D. S. Wright, McKissick, and others, solicitors for complainants.

163 The joint and separate answer and demurrer of Jas. E. Merriman, Barbour Lewis, Wm. Hack, and F. W. Louis to the bill of complaint filed against respondents by W. H. Walker *et als.*, on the relationof the State, in the chancery court at Memphis.

Respondents, saving and reserving, &c., for answer to said bill say: They have no knowledge of the facts connected with the passage of the bill in controversy. They have examined the published laws of the Legislature and find the same published therein, and

also have an attested copy of the same authenticated and attested according to law, which they file herewith, marked Exhibit A, and, with its attestation and certificate, pray that it may be made a part of this answer. It is true that respondents (having qualified as required by said act) have entered upon the discharge of their
164 duties according to said act, and are now engaged in the discharge of the same.

Respondents deny that they are usurping any office or franchise belonging to any other person, but submit that they are acting according to law.

Respondents submit that the constitution of Tennessee is not violated by said act in manner and form as is set forth in said bill, or in any other particular.

Respondents further demur to said bill, and for cause of demurrer say:

1st. There is no equity on the face of the bill.

2d. The court cannot look behind the solemn attestation and certificate on said act.

3d. The bill is multifarious.

4th. The court has no jurisdiction in the premises.

And for other good causes of demurrer.

And now, having answered said bill, &c., respondents pray
165 to be hence dismissed, with their costs, &c. As in duty bound will ever pray, &c.

THOS. R. SMITH,
M. R. HILL,
Sol's Resp'ts.

The above is substituted in lieu of the lost answer.

THOS. R. SMITH AND
M. R. HILL,
GANTT & WADDELL, AND OTHERS,
Sol's.

Endorsed: State, *ex rel.* W. H. Walker *et als.*, *vs.* Jas. E. Merriman *et als.* Answer and demurrer. Thos. R. Smith, M. R. Hill, for resp'ts.

166 STATE, at relation of WM. WALKER *et als.*, *vs.* JAS. E. MERRIMAN *et als.*

The affidavit of A. J. Fletcher, filed in this cause, and the affidavit of W. W. Coleman, also filed, are treated by agreement of parties as if they were the depositions of said affiants taken in form to be read as evidence in this cause; and, if competent and relevant, they are to be considered as proof; but otherwise to be excluded. The exhibit offered with the original bill, purporting to be an extract or copy from the journals of the senate, is to be treated as if authenticated according to law, and is to be considered as evidence if competent and relevant; but if not competent and relevant to be excluded. It is also agreed that the standing rules of the senate

and house of representatives, as adopted by the Legislature
167 of 1865, may be used as evidence; all the above subject to objections for competency and relevancy.

And it is further agreed that the certified and attested copy of the act of Assembly creating this court shall be considered as filed as an exhibit to defendant's answer and as a part of the record.

HUMES, YERGER, AND
GANTT & WADDELL AND OTHERS,
For Complainants.

SMITH & HILL,
THOS. R. SMITH,
For Defendants.

Endorsed: Agreement.

168 6. Defendant then offered a certified transcript of the final decree of the supreme court of Tennessee in the case of Wm. H. Walker *et als. vs.* J. E. Merriman *et als.*

169 THE STATE OF TENNESSEE:

Pleas before the supreme court of said State for the western division thereof, at Jackson, on the first Monday in April, A. D. 1871.

Present: The Honorable A. O. P. Nicholson, chief justice, and Thomas A. R. Nelson, Thomas J. Freeman, James W. Deadrick, Peter Turney, and John L. T. Sneed, associate judges.

To wit:

W. H. WALKER *et al.*
vs.
JAMES E. MERRIMAN *et al.* } No. 6. Mem. C. D.

JUNE 1ST, 1871.

This cause was this day heard by the honorable supreme court upon the transcript of the record below; and the court being of the opinion that at the time of filing the bill the complainants were entitled to the relief prayed for, and that the decree below dismissing the bill was erroneous, so orders, adjudges, and decrees; but
170 it appearing that the act under which the bill alleges the defendants usurped office has, since the filing of the bill, been repealed, and that the defendants have not, since the repeal thereof, assumed to exercise the powers and performed the duties in said act named, and are not now doing so, the court is of opinion that it is only necessary, under these facts, in addition to what is decreed above, to dispose of the costs of the cause, which is done by taxing them against the defendants and awarding execution therefor.

THE STATE OF TENNESSEE:

I, John H. Freeman, clerk of the supreme court of said State for the western division thereof, at Jackson, do hereby certify that the foregoing is a true, perfect, and complete copy of the decree pro-

nounced by said court at its April term, 1871, in the cause of
171 W. H. Walker *et al.* against James E. Merriman *et al.*, as appears of record now on file in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of the court, at office in the city of Jackson, on this 23d day of May, A. D. 1882, and of the Independence of the United States the 106th year.

[L. S.] JNO. H. FREEMAN, *Clerk*,
By D. P. DAVIS, *D. C.*

Endorsed: W. H. Walker *et al. vs.* J. E. Merriman *et al.* Copy of decree.

172 This was all the evidence.

The court charged the jury to find their verdict for the defendant, and thereupon the plaintiff tendered this his bill of exceptions, which was allowed, signed, and sealed this the 22d August, 1882.

E. S. HAMMOND, [SEAL.]
U. S. District Judge, &c.

Endorsed: No. 2637. Circuit court of the United States, western district of Tennessee. Extein Norton *v.* Shelby County. Bill of exceptions. Filed August 22d, 1882. Bell W. Etheridge, clerk. W. B. Weisiger, D. C.

173 United States of America, ——— Division of the Western District of Tennessee.

In the Circuit Court of the United States within and for the ——— Division of the Western District of Tennessee, in the Sixth Judicial Circuit thereof.

Proceedings had in said court, at a regular term thereof, begun and held for its May term, A. D. 1882, at the United States court-house in the city of Memphis, in said district, on, to wit, the 22d day of August, A. D. 1882, in the following cause, to wit:

EXTEIN NORTON, Plaintiff,
vs.
SHELBY COUNTY, Defendant. } No. 2637.

Comes plaintiff and moves for a new trial, which is by the court refused, and thereupon plaintiff tenders his bill of exceptions, which is examined, found correct, signed, sealed, and made a part of the record in this cause, and plaintiff having sued out a writ of error, gave bond therefor, which is approved by the court; and thereupon defendant, Shelby County, by its attorney, W. B. Glisson, Esq., appeared in open court and acknowledged service of the citation and copy of writ of error, which is ordered to be entered of record.

174 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States in and for the western district of Tennessee, Greeting:

Because in the record and proceedings, as also in the rendition of a judgment, of a plea which is in the said circuit court before you, between Extein Norton, plaintiff, and Shelby County, defendant, a manifest error hath happened, to the great damage of the said Extein Norton, as by — complaint appears, we, being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October, 1882, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, and the seal of said circuit court, at Memphis, this 22d day of August, A. D. 1882, and 107th of American Independence.

[Seal of the Circuit Court of the United States for the District of West Tennessee.]

BELL W. ETHERIDGE, *Clerk.*
W. B. WEISIGER, *D. C.*

174½ [Endorsed:] No. 2637. Law. Circuit court of the United States, western district of Tennessee. Extein Norton *vs.* Shelby County. Writ of error. Issued the 22d day of Aug., A. D. 1882. Bell W. Etheridge, clerk. W. B. Weisiger, D. C.

175 Supreme Court of the United States.

Know all men by these presents that we, Extein Norton, as principal, and W. K. Poston, as surety, are held and firmly bound unto Shelby County in the sum of one thousand dollars, to be paid to the said Shelby County and its executors or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals. Dated this 22nd day of August, 1882.

Whereas the above-named Extein Norton hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the circuit court of the United States for the western district of Tennessee, May 31st, 1882, in case No. 2637, Extein Norton *versus* Shelby County:

Now, therefore, the consideration of this obligation is such that if the above-named Extein Norton shall prosecute his said writ of

error appeal to effect, and answer all costs if he shall fail to make good he plea, then this obligation shall be void; otherwise, to remain in full force and virtue.

EXTEIN NORTON, [SEAL.]
By his Att'ys, HUMES & POSTON. [SEAL.]
W. K. POSTON. [SEAL.]

Acknowledged before me, this 22 day of August, 1882.
BELL W. ETHERIDGE, *Clerk.*
W. B. WEISIGER, *D. C.*

175½ [Endorsed:] No. 2637. Circuit court of the United States, western district of Tennessee. Extein Norton *vs.* Shelby County. Appeal bond, writ of error bond to United States Supreme Court. Filed the 22 day of Aug't, A. D. 1872. Bell W. Etheridge, clerk. W. B. Weisiger, D. C.

176 UNITED STATES OF AMERICA.

To Shelby County, of State of Tennessee, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday in October, 1882, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the circuit and western district of Tennessee, wherein Extein Norton is plaintiff and you are defendant in error, to show cause, if there be any, why the judgment in the said writ of error mentioned should not be corrected and speedy justice done to the parties in that behalf.

Witness the Honorable E. S. Hammond, judge of the district court of the United States for the western district of Tennessee, this 21st day of August, 1882.

E. S. HAMMOND, *Judge.*

176½ [Endorsed:] No. 2637. Law. Circuit court of the United States, western district of Tennessee. Extein Norton *vs.* Shelby County. Citation. Filed the 22d day of Aug., A. D. 1882. Bell W. Etheridge, clerk. W. B. Weisiger, D. C. Notice of citation & copy of writ of error waived and service acknowledged. Shelby County, by W. B. Glisson, attorney. Aug. 22d, 1882.

177 The United States of America, Sixth Judicial Circuit, Western District of Tennessee.

I, Bell W. Etheridge, clerk of the circuit court of the United States for said western district of Tennessee, do hereby certify that the papers hereto attached are *a* full, true, perfect, and correct copies of the original record and proceedings and the bill, &c., in case of Walker *et al. v.* Merriman *et als.*, in *said court in* chancery court of Shelby County, as the same now appear of record and upon the files in my office in the following cause, to wit: No. 2637. Extein Norton *vs.* Shelby County.

In testimony whereof I have hereunto set my name and affixed the seal of said court, at office in the city of Memphis, this 28th day of October, A. D. 1882, and of the Independence of the United States the 107th year.

[Seal of the Circuit Court of the United States for the District of West Tennessee.]

BELL W. ETHERIDGE, *Clerk.*

178 [Endorsed:] No. 2637. Circuit court of the United States, western district of Tennessee. Extein Norton *vs.* Shelby County.

Endorsed on cover: W. Tennessee, C. C. U. S. No. 194. Extein Norton, plaintiff in error, *vs.* Shelby County, State of Tennessee. Filed 22nd February, 1883.

Office Supreme Court U. S.
FILED
OCT 1. 1885
JAMES H. McKENNEY,
CLERK

118-425

Sept 1st

In United States Supreme Court.

OCTOBER TERM, 1885.

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EXTEIN NORTON, PLAINTIFF IN ERROR,

vs. } In Error from the Circuit Court of the United States for the Western District of Tennessee, at Memphis.

SHELBY COUNTY, TENN., DEFENDANT IN ERROR.

BRIEF AND ARGUMENT OF D. H. & W. K. POSTON

For Plaintiff in Error.

S. C. TOOF & CO. PRS. & LITHS., MEMPHIS

Supreme Court of the United States.

OCTOBER TERM, 1885.

EXTEIN NORTON, Plaintiff in Error,

vs. } In Error from the Circuit Court of the United States for the Western District of Tennessee, at Memphis.

SHELBY COUNTY, TENN., Defendant in Error.

ASSIGNMENTS OF ERROR.

Plaintiff in error assigns the following errors to the judgment of the court below:

That the court erred when it charged the jury peremptorily to find their verdict for the defendant.

1st. Because the defendant, Shelby county, having full legislative authority to make the subscription in aid of the construction of the Mississippi River Railroad through its county, and the subscription thereto and bonds therefor having been taken and issued in its name and under its corporate seal by the Board of County Commissioners, which was a *de facto*, if not a *de jure* court, created by an act of the General Assembly of the State of Tennessee and by virtue of the authority and powers delegated to it thereby, during the years 1867, 1868 and 1869 and until the 15th of November, 1869, held, possessed and exercised without question or opposition all the jurisdiction, power and functions before then devolved by law on the Quarterly County Court of said county, including the powers

expressly delegated to it by the act creating it: "To sub-"scribe stock to railroads, which the County Court of "Shelby has been authorized by general or special laws "to subscribe, and under the same conditions and restric-"tions, and to represent such stock in all elections for "directors, and to provide for the payment of subscriptions "as made." (Section 25, ch. 46, Acts of 1867.) Wherefore its said act in making the subscription and issuing the bonds therefor is obligatory and binding on the defendant county.

2d. The defendant county having due legislative authority to make the subscription and take the stock in said railroad company and issue bonds therefor, and such subscription having been made and bonds issued and stock taken in its name by the said Board of County Commissioners of Shelby county, by virtue of due authority delegated to and vested in them by act of the General Assembly for that purpose, such subscription and bonds issued therefor are binding up the defendant county.

3d. The defendant county having due authority to make the subscription and take the stock in said railroad and issue bonds therefor, and such subscription having been made and bonds issued and stock taken in its name by the County Commissioners of Shelby county aforesaid, and the defendant county afterward having taken the stock so received for said bonds and voted the same in all the meetings of the stockholders of said railroad company, and particularly for the consolidation of the Mississippi River Railroad with the Paducah and Gulf Railroad Company, and never having returned or offered to return the same, but retaining it to the present

time, and having levied and collected taxes during the years 1869, 1870, 1871, 1872, 1873, 1874 and 1875 to pay said bonds, and having through those years and the other years of 1876, 1877, 1878 and 1879 paid without question or opposition from the taxes so levied and collected for that purpose $212,000 of the $300,000 of the bonds issued and more than $100,000 of the coupon interest thereon, and in other ways ratified the subscription so made and bonds so executed, and having received the full benefits contemplated in its said subscription, to-wit, the building, maintaining and operating of the said railroad through its county, it is now estopped to deny its liability to plaintiff in error, who took these bonds now sued on, with others since paid, on the faith of such acts, before maturity, for value and in due course of trade.

4th. Upon the assumption that the said Board of County Commissioners were without authority to make the subscription or issue the bonds now sued on, yet the defendant county having full authority so to do with full knowledge of this unauthorized subscription, has fully ratified and confirmed the act of said commissioners in so doing by the acts aforesaid and from the date of the subscription and issuance of bonds therefor to the present date, neither the defendant county nor any citizen thereof having begun any suit or done anything to cancel, annul or call in question such subscription or said bonds, or prevent the collection or payment of taxes levied to pay the same, or prevent the payment of the bonds themselves and interest thereon through a period of ten years, and the defendant county itself having from 1870 to 1879 reported these bonds as a county debt in its financial statements and permitted them

to be sold in the open market, has estopped itself from relying upon the want of authority in its agent who made the subscription, but to the contrary has expressly ratified its action in the premises.

5th. That defendant county fully ratified the acts of the said Board of County Commissioners in making said subscription and issuing said bonds and estopped itself from controverting its liability upon these bonds sued on by plaintiff in error, when at the October term, 1871, of its Quarterly County Court, with full knowledge of the mode, manner and want of authority in said commissioners to do the acts aforesaid, it expressly agreed to the consolidation of the Mississippi River Railroad Company with the Paducah and Gulf Railroad and assured the payment of said bonds to plaintiff in error, then the president and a large owner and controlling the entire properties of the latter railroad, and who refused to enter into the consolidation, if these bonds now sued on with others of like tenor and effect, and which largely constituted the assets of the former railroad, were not to be paid. And such assurances having been given and the consolidation having been effected and plaintiff in error having taken said bonds on the faith of such assurances before due and for value, the defendant county is now estopped to call same in question, and same are now binding and obligatory upon it.

6th. Because the court did not give a peremptory charge to the jury to find for the plaintiff upon the facts and law as presented by the record.

D. H. POSTON & W. K. POSTON,
Attorneys for Plaintiff in Error.

Supreme Court of the United States.

EXTEIN NORTON, Plaintiff in Error,
versus
SHELBY COUNTY, TENN., Defendant in Error.

BRIEF AND ARGUMENT OF D. H. & W. K. POSTON
For Plaintiff in Error.

FACTS.

This suit is brought to enforce the collection of twenty-nine (29) bonds of defendant county, issued on the 1st day of March, 1869, by the Board of County Commissioners of Shelby county, in part payment of a subscription for three hundred thousand dollars of stock in the Mississippi River Railroad Company, and are of the denomination of $1000 each, due and payable on the 1st day of January, 1875, with interest payable annually on the 1st day of January of each and every year, the whole three hundred thousand dollars being represented by 300 $1000 bonds, maturing in six installments of $50,000, due respectively on the 1st days of January, 1870, 1871, 1872, 1873, 1874 and 1875.

These bonds purport, on their face, to be the obligations of the defendant county, and have thereon the impress of the county seal. They are signed by the Clerk of the County Court officially, and the seal is the seal of that court.

The county defendant first filed a demurrer, which was overruled, and then filed a plea of *non est factum*, averring

that the bonds were not the act or deed of the county, nor binding upon it, because executed by the Board of County Commissioners, a body not authorized by law to bind it in the premises.

To this plea, by leave of court, plaintiff replied several grounds of replication, to-wit:

1st. That said Board of County Commissioners were a *de facto* court, and, as such, did have power to make said subscription and issue said bonds.

2d. That the county, having the power and authority to make the subscription, even if it was made by an unauthorized agent, yet said county, with full knowledge of the fact, fully ratified the subscription made by receiving the stock so issued in payment for bonds, and retaining the same, and voting it at the meeting of the stockholders; by paying $212,000 of the $300,000 of bonds issued, besides about $100,000 of the coupons, through the years 1870–1–2–3–4–5–6–7–8–9; by the levy and collection of taxes through the years 1870, 1871, 1872, 1873, 1874, 1875, 1876; by recognizing said bonds as a valid debt against the county from the time of their issuance down to the present time, reporting in its financial statements said bonds as a part of the county indebtedness and the stock as a part of its assets.

3d. That said county fully ratified the acts of the said Board of County Commissioners in making said subscription and issuing said bonds and estopped itself from controverting its liability upon these bonds, when, at the October term, 1871, it expressly agreed to the consolidation of the Mississippi River Railroad with the Paducah and Gulf Railroad Company, and assured the latter railroad

and the plaintiff, then president and a large owner thereof, that these bonds, the assets of the former railroad, would be paid, and thereby induced it to effect a consolidation upon the representation that its said bonds were valid obligations and would be paid.

4th. That from the date of the subscription and issuance of the bonds to the present time, neither the defendant county nor any citizen or taxpayer thereof, have ever begun any suit to cancel, annul or question said subscription or said bonds, nor have there been any legal proceedings instituted by either county or citizens to question or prevent the collection of taxes levied to pay for said bonds or to prevent the issuance or payment of said bonds and coupons.

To these replications defendant filed lengthy rejoinders, and plaintiff filed rebutters, which make simply an issue on the replication.

The only issues presented by the record then are two:

1st. Was the subscription as made and bonds as issued by the Board of County Commissioners obligatory and binding on Shelby county?

2d. If not originally binding or obligatory, has or not the defendant county by receiving, voting and retaining the stock, levying and collecting taxes through a period of ten years, and paying $212,000 of the $300,000 of bonds issued and $100,000 of the interest thereon, and by assurance to the plaintiff in error before he bought these bonds sued for, that they were valid, obligatory and would be paid, both ratified the subscription and estopped itself to call the same in question.

BRIEF AND ARGUMENT.

I.

Our first proposition is, that the subscription as originally made, and the bonds as issued by the Board of County Commissioners of Shelby county, are binding upon it.

The defense rests solely upon the invalidity of their acts in the premises, and insists that said Board of County Commissioners were neither a *de jure* nor a *de facto* court, but a body of usurpers, and had no power to act for or bind Shelby county.

If the defense be untenable, as we insist it is, we are entitled to a reversal, without inquiry into other matters which we insist are equally conclusive in our favor, and which will be hereafter referred to and relied upon.

Let us examine the question, and see how far this tribunal was a *de jure* or *de facto* court. These bonds were authorized by sec. 6 of ch. 48, Acts of 1867, passed Feb. 25, 1867, and ch. 6, Acts of 1867, passed Nov. 5, 1867, and secs. 21 and 25, ch. 46, Acts of 1867, passed March 9, 1867. The two first acts gave the county court of any county through which the Mississippi River Railroad ran authority to make a subscription to the capital stock of said railroad company, and the last act, ch. 46, in secs. 21 and 25, which alone bear upon the question, provides:

Sec. 21. "*Be it further enacted*, That there shall be established in the county of Shelby in this State, a Board of "County Commissioners, to consist of five persons, &c." * *

Sec. 25. "*Be it further enacted*, That all the powers and

"duties which are now vested in and performed by the "quarterly court of said county, shall be vested in said "Board of Commissioners, and in addition to the powers "now conferred by law, shall have authority * * * to "subscribe stock to railroads which the county court "of Shelby county has been authorized by general and "special law to subscribe to, and under same conditions "and restrictions, and to represent such stock in all elec- "tions for directors, and to provide for the payment of "subscription as made." * * *

These are all the material portions pertaining to the question under consideration, but all ~~three~~ four acts are hereto appended as Exhibits 1, 2, 3. & 4

The two first last acts, in express terms, confer upon the defendant county authority to make the subscription and issue the bonds, and had the bonds been issued by the county court of defendant county instead of the Board of County Commissioners, there would be no difficulty.

This is conceded by defendant in its rejoinder. In fact, the two first of these acts have been construed by this court in the cases of—

Rogers Locomotive Works v. Tipton Co., 13 Otto 523.

Jno. T. Edmunds v. Tipton Co., same 540.

Jno. T. Edmunds v. Lauderdale Co., 1881 or 1882,

and by the courts of Tennessee in

Fargason v. Lauderdale Co., 7 B. J. Lea 153,

where it was held that the several counties had the power, through the county court, to subscribe for the stock in the railroad without reference to or dependent upon a vote of the people of the county.

Then the solitary question of defense presented is, could the Legislature delegate, as it attempted to do, this power to the Board of County Commissioners of Shelby county, which by the provisions of the two former acts of 1869 was vested alone in the county courts of the several counties through which the Mississippi River Railroad ran.

It will be seen that the Board of County Commissioners of Shelby county were vested with all the power conferred by law upon the quarterly courts, and especially with power to vote for and provide payment of subscriptions to railroads which the county was authorized to subscribe to and pay for.

This act is attacked as unconstitutional, and was so decided by the Supreme Court of Tennessee in Pope v. Phifer, 3 Heiskell 691, in 1871, upon a statute similar in all respects to the one under consideration.

We, however, insist that the decision as made was a political necessity, to rid the State of carpet-bag rule, and has been impliedly overturned and its reasons and policy overruled in the subsequent case of Halsey v. Gaines, 2 B. J. Lea, (Tenn.) 319.

An inspection of this 3 Heiskell case shows that it was put entirely upon constitutional grounds.

Let us examine and see how far such a position is tenable.

In Tennessee the Legislature can do all acts not prohibited by the State or Federal Constitution.

Bell v. Bank of Nashville, Peck's (Tenn.) R. 269.

Hope v. Deaderick, 8 Humphries 8.

"Every legislative body, unless restricted by the con-
"stitution, may modify or abolish the acts of its predecessor.
"Whether it would be well to do so is a matter of legisla-
"tive discretion. Unlike the decision of a court, a legisla-
"tive act does not bind a subsquent Legislature."

Blomer v. Stolley, 5 McLean 161.

"Any legislative act which does not encroach upon the
"powers apportioned to the other departments of govern-
"ment must be enforced, *unless restrictions upon legislative*
"*power* can be pointed out in the constitution and the cause
"shown to come within them."

Cooley Constitutional Limitations, p. 168; note 4.

"It is an axiom in American jurisprudence that a statute is not to be pronounced void upon this ground, (conflict with the constitution of the State), unless the repugnancy of the constitution be clear, and the conclusion that it exists inevitable. Every doubt is to be resolved in support of the enactment. The particular clause of the constitution must be specified, and the act admit of no reasonable construction in harmony with its meaning."

Pine Grove v. Talcott, 19 Wall. 673.

"The courts are not at liberty," says Judge Cooley, "to declare an act void because it is, in their opinion, opposed to a spirit supposed to pervade the constitution, but not expressed in words." Cooley's Const. Lim. 171, citing 24 Wend. 220; 20 Wend. 381; 13 Wend. 391, 453, 477; 4 Mich. 244.

"That is a spirit which it is difficult satisfactorily to materialize, even by the most skillful judicial expert," per Judge Cooper, in Luehrmann v. Taxing District, 2 B. J. Lea 438. (64, Tenn.)

In Hartford Bridge Company v. Union Ferry Company, 29 Conn. 210, the rule is thus announced: "It is, however, "a well settled principle of judicial construction that "before an act of the Legislature ought to be declared "unconstitutional its repugnance to the provisions, or neces- "sary implications of the constitution, should be manifest "and free from all reasonable doubt."

In the Pope v. Phifer case, 3 Heiskell, where the act in controversy was declared unconstitutional, that is, the act abolishing the county courts in several counties in the State and substituting the Board of Commissioners in their stead, the court, on page 684, presents the question as follows: "The first question presented for our consideration "is, whether the Legislature had the constitutional power "to do this. And the next is, whether it could be done in "the mode attempted; that is, by an exceptional enact- "ment applicable to one or more counties, and not by a "general law, applicable alike to all the counties in the "State and operating equally and alike over the whole "territory of Tennessee; in other words, is this the law of "the land within the meaning of the constitution?"

To see whether the Legislature could abolish these county courts and substitute in lieu thereof the Board of County Commissioners with like powers, we must look to the constitution of 1834, for it must be borne in mind that all of these acts were passed under that constitution.

That the county court was recognized as a constitutional court under the constitution of 1796 is clear. Article 6, section 1, provides: "There shall be appointed in each "county, *by the county court*, one sheriff, one coroner, one "trustee and a sufficient number of constables, who shall

"hold their office for two years." That such recognition does not appear in the constitution of 1834 is apparent from the mere reading of the provision. Article 6, section 1, reads: "The judicial power of this State shall be vested "in one Supreme Court: in such inferior courts as the Leg- "islature may from time to time ordain and establish, and "the judges thereof. The Legislature may also vest such "jurisdiction as may be deemed necessary in corporation "courts." Section 15 of the same article provides for the election of two justices for each district of every county in the State and gives them jurisdiction coextensive with the county, without defining the particular duties and jurisdiction they were to perform and exercise. Article 7, section 1, of the same constitution, 1834, provides for the election in each county of one sheriff, one trustee and one register. These officers were appointees of the county court under article 6, section 1, of the constitution of 1796. This article 7, section 1, of the constitution of 1834, provides: "*There shall be elected for each county by the justices of the peace one coroner and one ranger, who shall hold their office for two years.*"

Not elected by the county court, but by the justices of the peace.

To say that the framers of the constitution of 1834 meant *county court*, when they said the *justices of the peace*, were to make such appointments, would be subverting all the rules of construction and would be reinstating *pro tanto* the constitution of 1796, which was supplanted entirely by the constitution of 1834.

It will be observed that the constitution of 1834 only names "one Supreme Court." Its language is: "The

"judicial power of this State shall be vested in one Supreme "Court: *in such inferior courts as the Legislature may from "time to time ordain and establish, and the judges thereof.*"

Is there any inhibition in the constitution of 1834 on their power to ordain and establish? Is there any prohibition against abolishing any court and substituting in its place such other tribunal as will best subserve the public interests? Does not the constitution of 1834, instead of putting restraints upon, rather amplify the power of the Legislature and make them the sole judges of this necessity, and authorize them to meet the public necessities in this regard in such manner as to them may seem best? If the legislative power can only be limited by constitutional restraints, does not this constitution of 1834, as to all except the Supreme Court, make the Legislature the sole judge of the existence or continuance of any inferior court, with power to make any changes? Does it not expressly delegate this power, not by implication, but positive language? If so, is the county court an inferior court within the meaning of the constitution? If so, it must go whenever the Legislature chooses to say so. To show that this construction is not tenable and that no such tribunal as the county court was to be further maintained by the people of Tennessee, the constitution of 1870 provided: "The "judicial power of this State is vested in one Supreme "Court and such circuit, chancery and other inferior courts "as the Legislature shall from time to time ordain and "establish, and the judges thereof, &c." Like the constitution of 1834, does not mention the county court.

In Halsey v. Gaines, 2 B. J. Lea 319 (decided in 1879), the Supreme Court of Tennessee in passing upon the right

of the Legislature to abolish one of two circuit courts created under the constitution of 1870, says: "We have "seen that under the constitution of 1834 it was left to the "Legislature to determine how many inferior courts were "necessary to meet the public demands and to ordain and "establish them accordingly, and in so doing to abolish "courts previously existing and substitute others in their "place, and necessarily to increase and diminish the num-"ber at pleasure."

"The Legislature also had power to determine the *char-"acter* of the inferior courts, whether the circuit, chan-"cery or other courts."

"In this latter respect the constitution of 1870 makes a "change."

"Circuit and chancery courts are specified as some of "the inferior courts to be established by the Legislature "from time to time, and it may be conceded that the two "systems are therein recognized, and it may be further "conceded that the Legislature has no power to abolish "either system." And the court held that under the constitution of 1870 the Legislature had power to abolish and create, and as long as it left a circuit court it met the requirements of the constitution. It however in spirit recognized and stated that under the constitution of 1834 the legislative power over all courts except the Supreme Court was unlimited, and it might create or abolish all inferior courts at pleasure.

This last decision in Halsey v. Gaines, 2 B. J. Lea 319, we assert, in effect overrules the case of Pope v. Phifer, 3 Heiskell, decided in 1871, and all the decisions of the Tennessee court on the subject.

The Board of County Commissioners were clothed with all the powers and duties vested in the county court by an express act of the Legislature, and we have shown that the constitution of 1834 gave the power to the Legislature to change and alter the judicial system of the State in all respects except as to the Supreme Court. The Legislature under this constitution was to meet the public exigencies as they arose, and absolute power was given them in this respect. The constitution of 1796 recognized the county court; the constitutions of 1834 and 1870 both leave it out, the constitution of 1870 recognizing the Supreme, chancery and circuit courts. How any court could have ever found that the county court was a constitutional court under the constitution of 1834, we do not conceive. That constitution only provides for two justices of the peace for each district of every county, one Supreme Court, and "such *inferior courts* as the Legislature may from time to time ordain and establish."

The entire objection taken by the court to the act in the Pope v. Phifer case, 3 Heiskell, page 684, was "that it was "an exceptional enactment, applicable to one or more "counties, and not by a general law applicable alike to all "the counties in the State, and operating equally and alike "over the whole territory of Tennessee, and, in other "words, is this the law of the land under the meaning of "the constitution."

In Moore v. State, 5 Sneed 512, (decided in 1858,) the question was expressly decided. We quote from the opinion: "At an early day of the last session of the Legislature, "4th November, 1857, the general act of 22d February, "1856, creating the office of county judge for each county "in the State, was summarily repealed."

"On 18th February, 1858, ch. 38, the office was re-estab-
"lished for the counties of Davidson, Shelby, Knox, Mont-
"gomery and Williamson, and the powers and duties
"prescribed very much of the same character and extent
"as those conferred upon same officers under the previous
"act."

* * * * "It is contended that the act of February,
"1858, violates the 7th section of article 11 of the consti-
"tution, (1834,) against partial legislation, as it is limited
"to a few counties, and has not a general and equal appli-
"cation to the whole State."

"We think the act is not obnoxious to the objection."

"The policy of marring the uniformity and symmetry of a
"general system by the establishment of these local courts
"may well be questioned, but that the power to do so
"abides in the Legislature, we cannot doubt.

"They have exercised it in establishing a criminal as
"well as the common law and chancery court at Memphis;
"at Nashville a criminal court; a common law court at
"Chattanooga, and perhaps in other instances.

"The constitutionality of these acts has never, as we are
"aware, been questioned, although they have exercised
"jurisdiction of the lives and fortunes of individuals."
"Such acts are not partial in the sense of the clause re-
"ferred to." * * It is with the Legislature to determine
"how many and what kind of courts are required for the
"administration of justice, and what shall be the character
"and limits of the jurisdiction of each. They may like-
"wise christen the presiding officer with any name or title
"they may consider most appropriate. They might have
"denominated the officer in question a chairman, a chief
"squire, a president or presiding officer, as well as a judge.

"This could not affect the validity of the act by which he "was brought into existence or the extent of his jurisdic- "tion."

To same effect see—

Wilcox v. State, 3 Heiskell 110.

In County of Tipton v. Locomotive Works, 13 Otto, at page 533, the court passing upon these same objections says: * * * "Our conclusion is that those acts were "not repugnant to the constitution of the State, by reason "of the authority they confer on a limited number of "counties to make, and on a particular railroad corporation "to receive a subscription of stock, nor because they dis- "pensed with previous assent of the people of such counties, "expressed at a popular election."

That it was a *de jure* court we have no doubt, and that the court may fully understand and see the constitutional provisions of the constitution of 1796, 1834 and 1870 upon this legislative power we print herewith as exhibits A, B, C, D, etc., so much thereof as pertains to this particular subject.

If the court should agree with us in the proposition that it was a *de jure* court, then this controversy is at an end, as having already decided in the Tipton county cases on these same statutes, (13 Otto 523) that the subscriptions made by the county court to the railroad were valid, such decision necessarily concludes the present case, as the Legislature expressly gave such Board of County Commissioners the same powers that were possessed by the county court of defendant county.

Plaintiff's replications expressly put in issue the fact that

this was a *de facto* court, and that as provided by the act of their creation they, the Board of County Commissioners, from 1867 to November, 1869, exercised all the powers, functions and duties theretofore devolved upon and performed by the county court of the defendant county.

Upon the trial the defendant introduced Jno. Loague, county court clerk, who proved that said Board of County Commissioners did perform such duties, and claimed the right so to do by virtue of the legislative authority granted them, and were, during all this period, in possession and control of the records and property of the county.

See Loague's testimony in bill of exceptions at page ——. 80

The county court proceedings also show same state of affairs.

See Record page 20 to page 9.

Here then was a Board of County Commissioners created by an act of the Legislature and empowered thereby to supercede the county court and discharge all the duties required by law, or authorized to be done by it. They assumed the task and for two and a half years discharged the duties imposed upon them, or which the county court were by law required to perform. To say that they were not a *de facto court* in the exercise of such duties seems an absurdity, in the light of the decisions of the State of Tennessee, to say nothing of the general authority on the subject.

A public officer appointed or elected by the proper authority, although in violation of a constitutional inhibition, is yet a *de facto* officer, and his acts are binding as to the

public and third parties until he is removed by a proper proceeding.

Moore v. State, 5 Sneed 514.
Blackburn v. State, 3 Head 690.
Ward v. State, 2 Cold 605.
Venable v. Curd, 2 Head 582.
Pearce v. Hawkins, 2 Swan 87.

Venable v. Curd, 2 Head 582, was a case where the Legislature of Tennessee changed the time of the holding of the circuit court of Henry county, and the judge in ignorance thereof held court at a time not authorized by law, and Venable, against whom a judgment was rendered, sued out a writ of error and insisted in the Supreme Court that the judgment was erroneous and void. Wright, J., on page 584, in disposing of the question says: "We do not "think so. The circuit judge in this case acted under "color of legal authority and no objection was made to the "jurisdiction of the court, or the power of the judge to "act at the time the judgment was rendered.

* * * "The public acts of officers *de facto* are often "valid, though the authority under which they act is void. "Public convenience, as well as public justice, requires that "they should be supported.

"Indeed, no principle is better settled in the English and "American law than that the acts of officers *de facto* are "valid, when they concern the public, or rights of third "parties, who have an interest in the act done, and the rule "has been adopted to prevent a failure of justice," and the judgment was sustained.

In Blackburn v. State, 3 Head 390, a vacancy having occurred the Governor appointed a judge who was under

thirty years of age, the constitution of the State of Tennessee requiring all judges of circuit courts to be thirty years of age. Blackburn was indicted by a grand jury empanneled and charged by this judge, and when arraigned plead to the indictment this fact, and that his indictment, etc., was for this reason void. The court held him a *de facto* officer and his act valid, so far as the public was concerned.

And such officer's appointment although void in a direct proceeding cannot be attacked collaterally.

Moore v. State, 5 Sneed 514.

Blackburn v. State, 3 Head 690. And other authorities above cited.

The whole line of authority in Tennessee is to the same effect.

In Commonwealth v. McCombs, 56 Penn. Stat. R. 436, Strong, J., (afterward a judge of this court), in defining the phrase "*de facto*" officer, says: "When he who is ex-"ercising the duties of an office is acting under the ap-"parent authority of an act of an assembly, his title to the "office is not to be assailed collaterally. This, I under-"stand, has been again and again decided. *An act of an "assembly, even if it be unconstitutional, is sufficient to give "color of title, and an officer acting under it is an officer de "facto.*"

In Brown v. Lunt, 37 Maine 322, a justice of the peace, an annual officer, without any right to hold over, and who had been a justice of the peace for many years in succession, was not re-elected, but continued to act, and two years after his office expired took an acknowledgment of a deed, and the question as to the validity of the deed was raised.

The court held that one who actually performs the duties of an office with apparent right and under claim and color of an appointment or election, or one who exercises the duties of an office with at least a fair color of right or an acquiescence by the public in his official acts, is a *de facto* officer, and the acknowledgment was held good.

In Cocke v. Halsey, 16 Peters 71, where a clerk of a court left the State and the judge appointed a clerk *pro tempore*, and after the term of the court for which he was appointed elapsed, he continued to act, the clerk not having returned, and a trust deed having been delivered to him for record, and an execution having been levied on the property embraced therein, a controversy arose as to the validity of the trust so registered as between the beneficiary thereunder and the execution creditor, the latter insisting that the registration was void, as made by one without authority. Mr. Daniels, J., in disposing of the case, on page 87, says:

"That the judge had power to appoint a clerk *pro. tem-*
"*pore* seems never to have been questioned: that he did
"appoint seems as equally indisputable: the irregularity
"alleged is in the failure to limit the appointment to the
"term of the court. Admit for the present that the ap-
"pointment should have been thus limited and that the
"clerk has admitted the deed to probate after the term;
"yet within his character of clerk was he not within the
"very definition of the authority and within the concessions
"of the counsel clerk *de facto*, acting *colore officii*, and
"must not his acts, therefore, be valid so far as regards
"third persons who are interested in them? An affirm-
"ative answer to the inquiry is unavoidable.

In People v. Collins, 7 Johns. 549, speaking of the power of officers whose acts were impeached, the court says: "They were commissioners *de facto*, since they came "into office by color of title, and it is a well settled prin- "ciple of law that the acts of such persons are valid when "they concern the public, or third persons who have an "interest in the acts done, and this rule is adopted to pre- "vent the failure of public justice."

To same effect see

McKinstry v. Turner, 9 Johnston 135.
Bucknam v. Ruggles, 15 Mass. 173.
Carlton v. People, 10 Mich. 250.
People v. White, 24 Wendel 520.

For an exhaustive review of the English and American authorities on this subject which are in accord with the position taken by us above, see case of State v. Carrol, Supreme Court of Connecticut, reported in 12 American Law Register 165.

It therefore follows that this Board of County Commissioners for the defendant county, if not a *de jure*, unquestionably was a *de facto* tribunal, and in any event their act is a protection to all whose rights are to be brought in question. Acting under an act of the General Assembly, with power expressly given to them to do the very act complained of, it would be a legal monstrosity in conflict with all precedent to hold that these acts as to the public and third parties were nullities.

In all such cases the courts hold uniformly that the acts of such officers are of equal dignity and entitled to same faith and credit as if they were *de jure* officers.

It will be seen by reference to the Pope v. Phifer case, 3 Heiskell 682, that the bill was filed by justice of the peace and citizens, to restrain the Board of County Commissioners from organizing and attacking the act as unconstitutional, and this before any action was taken. In the case of Walker et al. v. Merriman et al., the suit involving the Board of County Commissioners for the defendant company was brought by the justice of the peace, and was more a contest over office than anything else. No injunction was obtained, or if obtained was retained, and the County Commissioners took possession of the county property and affairs, and discharged all the duties that the county court could or were authorized to do.

Their act in making the subscription to the Mississippi River R. R. Co. was the act of a *de jure*, or in any event a *de facto* court, and as such is obligatory and binding on Shelby county.

We therefore insist that the case of Pope v. Phifer, 3 Heiskell 682, and Walker v. Merriman, MS., are out of harmony with the plain reading of the constitution of 1834, and the decision of the Tennessee court in Moore v. State, 5 Sneed 510, and Wilcox v. State, 3 Heiskell 110, decided before the Pope v. Phifer case was, and with the case of Halsey v. Gaines, 2 B. J. Lea 319, decided afterwards. In fact in Lauderdale Co. v. Fargason, 7 B. J. Lea 166, Freeman, J., who delivered the opinion in Pope v. Phifer, 3 Heiskell, delivered the opinion and decided exactly to the reverse of his former opinion, and held that these acts were not partial laws and were not obnoxious to the constitution of 1834. This court has uniformly followed the rulings of the Supreme Courts of the several States upon

the construction of their own constitutions and legislative acts in so far as they are harmonious, sustained by reason or authority, and not violative of all truth, law and justice; but they refuse to follow the oscillating and unsatisfactory opinions rendered in conflict with previous well adjudicated opinions, and especially where to follow them would affect rules and rights of property acquired in good faith, and predicated upon such former adjudication and interpretation, legislative, exclusive and judicial.

Gelpeke v. City of Dubuque, 1 Wallace 175.

A contract valid under the laws and adjudications existing, and understood at the time of its contraction will not be invalidated by subsequent legislation or adjudication to the contrary.

Havermeyer v. Iowa City, 3 Wallace 294.
Ohio Life and Trust Co. v. Debolt, 16 Howard 432.
Pine Grove v. Talcott, 19 Wallace 677.
95 U. S. 369. 11 Otto 679.

Questions affecting the validity of commercial securities belong to the domain of general jurisprudence, and are not controlled by the State adjudications. Hence a decision of the State court adverse to the validity of a law under which municipal bonds have been issued, made after their issuance, will not affect their validity, if this court shall be of opinion that the decision was wrong. And a construction, tending to destroy contracts, already made, put by the State courts upon their own statutes, will not be followed, but this court will construe the contract and the law according to their own views of the intent and meaning.

Groves v. Slaughter, 15 Peters 449.
Rowan v. Runnels, 5 How. 134.

Planters Bank v. Sharp, 6 How. 324.
State Bank v. Knoop, 16 How. 369, 391.
Ohio Life & T. Co. v. Debolt, 16 How. 432.
Butz v. Muscatine, 8 Wall. 575.
Olcott v. Supervisors, 16 Wall. 678.
Pine Grove v. Talcott, 19 Wall. 666, 677.
Same case, Bench and Bar, Vol. 1, Nos. 3 and 4, p. 54, opinion by Judge Emmons.

The result of the authorities on this point is very clearly stated by Judge Dillon in Foote v. Johnson County, 6 Central Law Journal, 345, thus:

"The Supreme Court of the United States considers questions arising upon negotiable municipal bonds issued under State authority, to relate to commercial securities, and not to present questions of mere local law; and where such securities have been issued before any decision of the State tribunals denying the validity of the act authorizing the issue, the Supreme Court has declared that in protecting constitutional rights of creditors, it will decide for itself whether, under the constitution and laws of the State, such securities are valid or void." This language is repeated by Judge Dillon in Westermann v. Cape Girardeau County, 7 Central Law Journal, 353.

In Pine Grove v. Talcott, 19 Wallace 677, Judge Swayne says, "The question before us belongs to the domain of general jurisprudence. In this class of cases this court is not bound by the judgment of the courts of the States where the cases arise. It must hear and determine for itself. Here commercial securities are involved. When the bonds were issued there had been no authoritative intimation from any quarter that such statutes were invalid."

It will be observed that under the constitution of 1834 there was no restriction on the Legislature in delegating the power of making county or municipal subscription or aid to any agency it chose. The county court or quarterly court had no inherent or constitutional powers in the premises, and all the authority it possesses is such as is expressly delegated to it, and why the Board of Commissioners, or any other agency, could not have been selected by the Legislature to do the act we cannot perceive, as they alone were the judges of the medium and expediency of selecting the medium through which the same was to be effected.

But it is not required for the purposes of our case that the Board of County Commissioners should be either a *de jure* or *de facto* court or official board, for it is well settled that work which is a public use or necessity may be done by the State directly, or by *any agency or instrumentality* selected by the Legislature.

The Legislature may compulsorily require the municipal corporation to build a bridge, or the Legislature may appoint agents of *its own* to build it, and empower *them* to issue bonds of the municipality to pay for it.

1 Dillon Municipal Corp. (3 ed.), section 74, and cases cited in note.
Philadelphia v. Fields, 58 Penn. Stat. 320.
Darlington v. Mayor, 31 N. Y. 164.
U. S. v. B. & O. R. R. Co., 17 Wall. 332.
People v. Flagg, 46 N. Y. 401.
Town of Guilford v. Supervisors, 3 Kernan.

The full power of the Legislature of the State over municipal corporations is recognized in Tennessee.

Leuhrmann v. Taxing District, 2 B. J. Lea 425.

In the case U. S. v. B. & O. R. R. Co., 17 Wallace, cited above, this court in passing upon an act of the Legislature of Maryland authorizing the city of Baltimore to issue and sell its bonds for $5,000,000 and lend the proceeds to the railroad company, said:

"A municipal corporation like the city of Baltimore is a *representative* not only of the State, but *is a portion* of its governmental power. It is one of its creatures, made for a specific purpose, to exercise within a limited sphere the powers of the State. The State may withdraw these local powers of government at pleasure, and may, through its Legislature, or other appointed channels, govern the local territory as it governs the State at large; it may enlarge or contract its powers or destroy its existence."

* * * * * * * *

And again:

"The power in question was conferred because its exercise concerned the public, and to benefit the public, this power could, no doubt, have been *imposed upon the city as a duty*, and its exercise *directed without the assent or against the wish of the corporation or its citizens*. The State could do it directly for and on behalf of the city, and without its intervention. The city could act only by authority from the State. The State is itself supreme and needs no assent or authority from the city."

In no State was legislative power and control over the agencies to be selected by it in carrying out its public schemes and enterprises under the constitution of 1834, more unrestricted and unlimited than in Tennessee.

In L. & N. R. R. Co. v. County Court, 1st Sneed, decided in 1854, in speaking of county subscriptions to railroad

companies and levying taxes to pay for same, Carnthers, judge, on page 676 says:

"But again, this act provides for the creation of a county "debt for stock in a road, and a tax to meet it, and this is "suspended on the vote of the people, and not the action "of the court. The Legislature, it is admitted, could do "this, or it could empower the court or a corporation to "do it, but it cannot leave it to the people. What says "the constitution? 'The General Assembly shall have "power to authorize the several counties and incorporated "towns in the State to impose taxes for county and corpo- "ration purposes respectively, in such manner as shall be "prescribed by law.' Art. 2, sec. 29. By another section "the 'Legislature is authorized to vest power over private "and local affairs in the courts of justice.' Art. 11, sec. 8. "But here in relation to the very delicate subject of taxa- "tion, the authority to impose taxes for county purposes "(and we have seen this is such a purpose,) is to be com- "municated to the 'counties,' not to the courts, nor to the "justices, nor to the officers. And how shall this power "be exercised? By what agency or instrumentality? By "the county courts or the circuit courts, or by representa- "tives from each civil district, selected for that purpose in "convention or by the people? No. The mode of doing "it is left to the General Assembly. The authority is to be "exercised by the '*counties in such manner as shall be pre-* "*scribed by law.*' The Legislature then, have by the con- "stitution, the *unequivocal power to determine and direct* "how and in what manner these taxes may be imposed by "the counties and upon themselves, as well as to what ex- "tent and for what purpose. That the county court may "have been empowered to act for the county on this subject

"is no objection to the different mode or agency adopted "in the act."

We might, therefore, safely rest our case here, as we think we have conclusively shown:

1st. Legislative authority to make the subscription and issue the bonds.

2d. That the bonds so issued were by the proper authority, or at least such authority as make them obligatory and binding on the county.

But the other matters now to be discussed are, in our opinion, equally conclusive.

II.

Upon the assumption that the defendant county had the legislative authority to make the subscription and issue the bonds, which is conceded, and upon the farther assumption that the Board of County Commissioners had no authority in the premises, we insist that the county court of defendant county fully ratified and confirmed the unauthorized action of the said Commissioners in making such subscription and issuing said bonds, and has estopped itself from gainsaying or questioning its liability by the following acts done by it in full recognition of its liability therefor.

1st. By taking the stock received for said bonds and subscription, voting same in all the meetings of the railroad company, and by retaining the same and making no offer to return the stock.

2d. By levying and collecting taxes to pay the same

through the years of 1869, 1870, 1871, 1872, 1873, 1874 and 1875.

3d. Actually paying $212,000 of the $300,000 of bonds, and more than $100,000 of interest thereon, through the years 1870 to 1879.

The Board of County Commissioners having been enjoined and removed by the decree of the Supreme Court in the case of Walker et al. v. Merriman, the quarterly court of Shelby county met and organized on November 15, 1869, and at once took charge of defendant's affairs.

See Record page ——. 21

Among the assets of the county, it found the certificate for 3000 shares of stock in the Mississippi River Railroad Company.

Agents to represent and vote this stock in the corporate meetings of said railroad company were appointed by said quarterly county court at its sessions of April, 1870, July, 1870, April, 1871, January, 1873, and subsequent terms.

See Record page ——. 34 - 35 - 39 - 57

And in October, 1871, that court directed this stock to be voted for the consolidation of that railroad company with the Paducah and Gulf Railroad Company.

See Record page ——. 42

And on 8th of January, 1873, made the following order:

"Whereas, this county holds the certificate of three hundred thousand dollars of the capital stock in the Mississippi River Railway Company, and, whereas, since the issuance of the certificates the said Mississippi River Railway Company has consolidated with the Paducah and Gulf

Railroad Company, under which act of consolidation the company hitherto known as the Mississippi River Railway Company becomes an integral part of the Paducah and Memphis Railroad Company—

"It is therefore ordered that the said certificates of stock in the Mississippi River Railway Company be surrendered to the Paducah and Memphis Railroad Company on the condition that the said Paducah and Memphis Railroad Company issue to the county of Shelby, certificates for stock in the Paducah and Memphis Railroad Company in lieu of the certificates for stock in the Mississippi River Railway Company, and that the clerk of this court be directed to surrender the said certificates of the county and receive the certificates for a like amount in the capital stock of the Paducah and Memphis Railroad Company."

See Record page ——. 57

This new stock in the consolidated company was thereafter used, claimed and voted by defendant, through agents appointed for that purpose, in the corporate meetings of that company, and is yet retained and held by it.

2d. By levy and collection of taxes to pay these bonds through the years 1869, 1870, 1871, 1872, 1873, 1874 and 1875.

When, on the 15th day of November, 1869, said quarterly court resumed control of the county affairs, and supplanted said Board of County Commissioners, the taxes for the year 1869 had been levied, but the tax books had not been issued, or the taxes collected.

Among these tax levies was a tax of twenty cents on each hundred dollars' worth of property for the payment

of the first installment of the bonds issued to pay for said stock subscription.

See Record p. —. 40

Attention is here called to the fact, that while the Board of County Commissioners had made the subscription for the railroad stock and had issued these bonds, they had done nothing more, had paid nothing thereon.

The fact is, the Board of Commissioners were deposed on the 15th of November, 1869, and on that day the quarterly court of Shelby county, composed of its justices of the peace, took control of its affairs, its taxes, moneys and assets, and not until the 1st day of January, 1870, thereafter, did the first series of these bonds, $50,000 bonds, besides $18,000 of interest, mature—and these the county court, *not Board of County Commissioners*, paid on the 19th of March, 1879, and afterwards.

This county court, however, directed the collection of said tax levy of 1869, and, at its April term, 1870, made itself another levy of twenty cents more for the payment of the second installment of said bonds.

See Record pp. —, —. 3 3

Thus we see this county court prior to 5th of May, 1870, when the new constitution went into effect, claimed and used the stock in the railroad company as the property of the county, and voted it in the company meeting, and also makes provision for the payment of the first installment of bonds, maturing January 1st, 1870, and interest, and actually pays the same. And at April term, 1870, and on the 11th April, 1870, levies taxes as follows:

"Mississippi River Railroad Bonds, 20 cents on the $100 worth of taxable property.

"Coupon tax, 20 cents on the $100 worth of taxable property."

See Record p. ——. 33

And on April 16th, 1870, amended its order of the 11th of April in regard to the tax, as follows:

"Ordered that the tax heretofore levied on the 11th inst. for coupons be, and the same shall read as follows: Ten cents on each $100 worth of taxable property for the bonds of the Memphis and Ohio Railroad, and ten cents for the bonds of the Mississippi River Railroad Company, to be collected in cash."

See Record p. ——. 34

It then appears that during the year 1870, and for the taxes of that year, the defendant county, through its county court, levied a tax of 20 cents on the $100 to pay Miss. River R. R. Co. bonds, and ten cents to pay coupons on same.

During April term, 1871, the following proceedings were had in reference to the tax to pay these bonds and coupons:

On April 11, 1871, the following report was submitted to the court:

"*To the Honorable County Court for Shelby County:*

"The undersigned, a committee appointed by your honorable body at the present term, to consider and examine the report made by Samuel Mosby, W. B. Greenlaw, W. M. Farrington, H. E. Garth, A. Woodruff and Hiram A. Partee, Esquires, in reference to the county finances, looking to a speedy and permanent improvement of them, beg

to report they have performed the duty assigned, and, in conjunction with the above committee, submit the following report, to-wit:

* * * * * * *

Resolved, 1st. "That a special tax of fifteen cents (15c) on the one hundred dollars be assessed to pay the Mississippi River Railroad bond tax."

* * * * * * *

Signed,

S. MOSBY,	ELIJAH PULLIAM, J. P.,
H. E. GARTH,	E. W. CALDWELL, J. P.,
WM. B. GREENLAW,	W. WALLACE, J. P.,
WM. M. FARRINGTON,	P. M. WINTERS, J. P.,
A. WOODRUFF,	J. M. CREWS, J. P.,
	W. B. GLISSON, J. P."

"Which resolution was rejected."

And on April 12, 1871, the following order was made and entered:

* * * * * * *

"Ordered by the court that the action of this court refusing to levy the special tax of fifteen cents on the one hundred dollars worth of property of Shelby county, to pay the interest on the bonds of the Mississippi River Railroad Company be, and the same is hereby reconsidered and rescinded, and upon application of Alfred T. Lacy, President of the Mississippi River Railroad Company, and also John L. Norton, Secretary, a special tax of fifteen cents on the one hundred dollars be assessed to pay the interest on the Mississippi River Railroad bonds."

"But the same shall not be a waiver of the right of this court to order the money collected on said assessment withheld at any time when it may appear to the court

that the officers of the road are misappropriating funds or failing to prosecute the work on the road with due diligence."

"To which above order the said Lacy and Norton agree."

And on Friday, July 7, 1871, the following entry appears of record, to-wit:

"Whereas, on April 12, 1871, the same being one of the days of the April term, 1871, of this court, an order was passed assessing a tax of fifteen cents on the one hundred dollars' worth of property in Shelby county, to pay the bonds issued by Barbour Lewis, president of the Board of County Commissioners, to the Mississippi River Railroad Company, and, whereas, said tax was levied conditioned upon the 'proper appropriation of funds,' and 'the prosecution of the work on said railroad with due diligence,' and whereas, the said tax was levied under a misapprehension or without a knowledge of the law in the case, and whereas, the Supreme Court of Tennessee have lately decided that the acts of Barbour Lewis, as president of the Board of County Commissioners of Shelby county, were unauthorized and void, and whereas, the said bonds were issued by the said Barbour Lewis, president, &c., without the consent of this court had and obtained according to law, and whereas, it appears to the satisfaction of the court that the said railroad company have not, nor are not prosecuting the work on said road with due diligence, and whereas, this court has been advised that said tax assessment is illegal, now therefore, for the joint and several reasons above stated, be it ordered by the court that the *said order of April 12th, 1871, laying a tax of fifteen cents on the hundred dollars' worth of property as aforesaid, be and the*

same is hereby reconsidered, revoked and held for naught, and the tax collector of Shelby is hereby ordered to fail and refuse to collect said tax.

"Be it further ordered that the clerk of this court furnish to Wm. McLean, tax collector, a copy of this order, and be it further ordered that this order shall not be revoked, except by a vote of the majority of the magistrates of Shelby county."

Record p. ——. 39- 40

And on October 5th, 1871, the following entry appears of record to-wit:

"Ordered that the order of this court made at July term, 1871, suspending the collection of the tax levied to pay the subscription of Shelby county to the capital stock of Mississippi River Railway Company be, and the same is hereby rescinded, and the tax collector is hereby instructed to proceed with the collection of said tax of fifteen cents on the hundred dollars as already assessed, and that when collected, the same shall be held subject to be paid over to the parties entitled to receive it, on the order of the chairman of this court whenever he shall have satisfactory evidence that the work on the road from Memphis to the north line of Shelby county is under contract and in process of construction, the money to be paid out only on the estimates of the chief engineer of the work."

See Record p. ——. 41

And on 12th July, 1872, another tax was levied as follows:

* * * * * * *

"Miss. River R. R. tax, 15 cents on the $100 worth of property."

Record p. ——. 50

July 10th, 1873, a tax was levied as follows:

"Miss. River R. R. Bond tax, 20 cents per $100."

Record p. ——. 52

April 10th, 1874, a tax for same purpose of 15 cents on each $100 of assessable property."

It then appears that the county court of defendant county actually assessed, levied and collected taxes for 1869, 1870, 1871, 1872, 1873 and 1874, to pay these bonds and coupons.

3d. It will be bourne in mind that although the Board of County Commissioners made the subscription, and issued the bonds which bore date March 1st, 1869, the first series of which matured January 1st, 1870, yet they never collected a dollar of tax, nor paid a bond or any interest thereon. They were deposed November 15th, 1869, by the county court who renewed the levy of taxes as made, and paid the following bonds and interest:

On or prior to March 19th, 1870, coupons $18,000, bonds $23,000, total $41,000.

See Record p. ——. 36

And on 8th of July, 1872, James Reilly, clerk of the county court of defendant county, made his report, showing that to that date the county court had paid and cancelled $109,220.00 of these bonds and interest.

See Record pp. 41 to 50

And on March 29, 1873, the same clerk reports these bonds and coupons paid and cancelled by him to that date, amounted to the sum of $142,772.40.

See Record pp. ——, ——. 57

The county court clerk files a tabulated statement of the bond register of the defendant county, which shows that of the 300 bonds issued to the Mississippi River Railroad Company only 88 for $1000 each and 42 coupons of $60 are unpaid.

See Record, pages 66 to 70

The testimony of H. B. Cullen, deputy clerk of the county court, shows that all the bonds and coupons so issued to the Mississippi River Railroad Company, except those set out in the tabulated statement before referred to, had been paid, and *all paid since January 1, 1870.*

See bill of exceptions, Record, page —. 79

In addition to all this the county of Shelby continually reported and published these bonds as county liabilities and so treated them.

See Record, pages ——. 53 - 54 - 55 - 56

Here then we have all the acts of ratification that could possibly have been made.

1st. Taking the stock, voting it for many years and still retaining it.

2d. Levying and collecting taxes for many years to pay the same.

3d. Actually paying the bonds and coupons with full knowledge of the invalidity of the act of the said County Commissioners.

And 4th. Reporting, publishing and treating the bonds and coupons as liabilities of the county for many years.

The defendant county *having authority* to make the subscription, and such subscription having been made in its

name, it could ratify the same and make it as obligatory as if originally made by it. It would be otherwise if the county had no power in the first instance to make it. Or stating it in another way, the defendant could, by ratifying or adopting what had been attempted to be done by one not authorized to represent and bind it, do what *it* had the power, in the first instance, to have done.

In McCraken v. City of San Francisco, 16 Cal. 524, Field, J., at p. 624, says: "It follows, also, from the general doctrine, that a ratification can only be made when the principal possesses at the time the power to do the act ratified. He must be able, at the time, to make the contract to which by his ratification he gives validity."

When a person assumes to act for another, *without authority*, if the principal subsequently ratified the act, he is bound by it, whether it be to his detriment or advantage.

Story on Agency, section 242, 251.

A principal cannot ratify a part and disaffirm a part; and where a ratification is established as to a part, it operates as a confirmation of the whole of that transaction by that agent.

Story on Agency, section 250.

Seago v. Martin, 6 Heiskell 308.

In O'Conner v. Carver, 12 Heiskell 437, a sale of the property of the complainant was had in the county court, and the sale was void, as decided by the court, but the complainant, after arriving at majority, had a settlement with her guardian, and received from him $1,000 of the proceeds of the void sale, and the court held that though a minor at the time of the sale, and now seeking to disaffirm

the decree, the reception of the money was a ratification and estopped her. Freeman, J., on page 441, says:

"We think it a case of express ratification of an act done "without legal authority, in her name; a ratification for a "sufficient consideration, equivalent to a new contract, "which she ought not to be aided in repudiating. She "ought not, under these circumstances, to *keep the money "thus obtained, and at the same time assert a claim to the "land.*"

A principal must elect between his right to consider the act of the agent void, and pursue his property, or affirm the act and sue for the price. He cannot claim in both rights; and slight circumstances, such as retaining and attempting to collect the obligation taken by such agent, would be deemed a ratification.

Lloyd v. Brewster, 4 Paige ch. 540.
Oil Works v. Jefferson, 2 B. J. Lea 581.
Walker v. Walker, 7 Baxter 260.

The taking of stock and voting it, and levy and collection of taxes to pay the subscription or bonds issued therefor, estop the county from denying its liability, assuming it had the right to subscribe.

Nugent v. Supervisors of Putnam County, 19 Wal. 241.
Anderson, C. v. State, 8 Baxter (Tenn.) 249.
Supervisors v. Schenck, 5 Wallace 772.
County of Pendleton v. Amy, 13 Wallace 297.
County of Ray v. Vansycle 6 Otto 687.
Burroughs on Public Securities pp. 347-8-9.

In the County of Ray v. Vansycle, 6 Otto 687, Harlan, Justice, says as to circumstances quite the same as these, as follows:

"But whatever doubt exists upon this point should be "resolved in favor of the bona fide holders of the bonds. "The taxpayers of the county should not, under the pecu- "liar circumstances of this case, be now heard to allege "that their agents, invested by statute with the authority "and charged with the duty of protecting their interests, "had exceeded their powers. The court levied and col- "lected a tax to pay interest due on the bonds delivered to "the St. Louis & St. Joseph Railroad Company for the "years 1869, 1870, 1871, 1872 and 1873.

"The coupons were annually paid for the first four years "named. It is true that at a term of the court held in "August 1871, an order was entered of record, stating that "the bonds had been issued illegally and were void, and "upon that ground the order recited that neither the bonds "nor coupons would be paid by the county. But in March, "1872, that order was rescinded, and the county treasurer "directed to proceed with the payment of the interest. It "was not until August 1873, that the court finally deter- "mined to repudiate all obligation to pay the bonds; and "under its orders the interest collected for 1873, has been "retained. It further appears from the special finding that "the North Missouri Railroad Company constructed its "western branch from Moberly to Kansas City, running "through the county for a distance of between twenty-six "and twenty-eight miles; that the St. Louis & St. Joseph "Railroad constructed its road from opposite Lexington, "through Richmond, locating a depot in Richmond, and "continuing to the northwest boundary of said county, a

"distance of twenty-eight miles; that said road is com-
"pleted and operated to the city of St. Joseph, Missouri;
"that on the first named road there are four depots located
"in Ray county, and on the latter, five depots; that the
"money realized from the sale of the bonds issued was ex-
"pended in the construction of the St. Louis & St. Joseph
"Railroad, in the county of Ray, and in consequence of
"this arrangement, the county secured the construction
"and operation, within its limits, of about twenty-four
"miles of railroad more than would have been built under
"the previous contract or arrangement with the North
"Missouri Railroad Company.

"But this is not all. In payment of the county sub-
"scription and bonds, certificates of stock in the St. Louis
"& St. Joseph Railroad Company were issued to the coun-
"ty, and are still held by it. They have never been ten-
"dered for cancellation. When the court declared, in 1873,
"that the county would pay neither the principal nor the
"interest due on the bonds, no intimation was given of even
"its willingness to surrender the certificates.

"Upon the clearest principles of justice, the taxpayers
"of Ray county *are concluded by the act of their official*
"*agents*, and by their own failure, either intentionally or
"from neglect, to assert by appropriate proceedings, their
"legal right (if any they ever had) to prevent the transfer
"of their original subscription to the company, which, by
"the construction of its road, gave them greater railroad
"facilities, and at no greater cost, than they could have
"obtained under the contract with the North Missouri
"Railroad Company."

In Ross v. Anderson county, MSS., Supreme Court of Tennessee, 1874, a petition for mandamus was issued which

averred that the county of Anderson, on account of said subscription, issued about one hundred thousand dollars of its bonds, in sums of five hundred dollars and one thousand dollars each, payable thirty years from date, with coupons or interest warrants attached for the payment of interest semi-annually, at the rate of six per cent. per annum. That the relator is the owner and bona fide holder for value of seven of said bonds, amounting to $6000, and that fourteen of the interest coupons were due at the time of filing the petition, and fourteen would fall due on the 1st of January, 1874. That he had made demand of payment of the county trustee, and of the justices composing the said county court. That the said trustee refused to pay, stating that he had been so ordered by the court; and that the said justices had replied that said coupons would not be paid.

It also contained these particular averments: "That said bonds or warrants have been recognized by the county court of said county as a valid debt against said county, from the time they were issued, until a short time previous to the commencement of this suit; and that the county has paid all the interest due upon said bonds up to the 1st of July, 1872, including the interest due at that date. The county court has levied and collected taxes for the payment of said coupons or interest warrants, and the citizens of said county have paid said taxes for that purpose, and neither the county court, nor any citizen of said county, prosecuted to a successful termination any suit in law or equity, to prevent the issuance of said bonds, nor to prevent their negotiation by the Knoxville and Kentucky Railroad Company; and there never was any proceedings instituted, either by the county or any citizen thereof, to have said

bonds or coupons declared void, nor to prevent their issuance or negotiation, but the same have been treated by the county court and the citizens of said county as a valid debt against said county, from the time they were issued, until after the 1st of July, 1872, and said county has paid the relator all the interest that has accrued on the bonds mentioned in his petition, ever since he has received said bonds, except the coupons or interest warrants mentioned in said petition." Upon the hearing of the cause by the circuit court the peremptory mandamus was refused and the petition dismissed. The relator appealed.

Sneed, J., delivering the opinion of the court, says:

"The main ground of defence presents questions of much public importance, and of more difficulty than the preliminary questions thus briefly disposed of. It is insisted that the county of Anderson is not liable for these bonds and coupons, because they were issued without authority of law. It is certainly clear that the county had no right to contract this debt without legislative authority. But we may observe, at the threshold, that, after the solemn obligations of the county have been negotiated, and thrown upon the commerce of the country, into the hands of *bona fide* holders, who, so far from having any notice of any supposed illegality, were encouraged by the county itself, through a series of years, to give them implicit credit, it would require a very grave departure from legislative restrictions to justify the courts in exonerating the county. Indeed, the doctrine of ratification itself would be a legal panacea to all manner of mere irregularity, and must be fatal to the defence, unless it can be shown that the issuance of the bonds in question was, *ab initio*, void. By the act

of 1852, ch. 117, the several counties of this State were authorized to subscribe for stock in any railroad enterprise located, or to be located, through said counties. This act initiated our system of railroad improvements, and is very liberal in its terms.

* * * * * * * *

"It will be seen, by reference to these acts, that the bonds in controversy were issued in exact and literal compliance with the statutes. They have gone into the hands of *bona fide* holders. The county of Anderson has received the consideration, and has estopped itself from impeaching their validity, except by showing a want of lawful authority to take the stock and issue the bonds. This they have failed to do. We might have contented ourselves by resting this case upon the high authority of the Supreme Court of the United States, that the bonds on their face import a compliance with the law under which they were issued, and the purchaser was not bound to look further for evidence of a compliance with the condition to the grant of the power."

Commissioners, &c., v. Aspinwall, 21 How. 544.

"But in view of the great importance of the questions involved, we have met them as presented by the able argument of the counsel for the county of Anderson. Reverse the judgment, and let a peremptory mandamus be awarded."

The case of Supervisors v. Schenck, 5 Wallace 772, is very similar to the case under consideration.

There the supervisors of Marshall county, Illinois, were sued upon the obligations of the county; a special plea was interposed that the bonds were issued without proper

authority and were void. The objection was that the election was ordered and held by the county court instead of the Board of Supervisors, the only proper authority to act. Special replications admitted the fact, but alleged that the bonds and coupons were used in payment for stock of the company, which stock was received by the county; that the county enjoyed all the benefits of a stockholder; that the bonds were sold by the railroad company to the plaintiff for value, without any notice of any want of authority to execute the same other than the constructive notice implied from the record; that ever since the date of the bonds the Board of Supervisors had annually levied and collected the necessary taxes and paid the interest on them and had thereby ratified and made them valid.

A general demurrer was interposed and a judgment against the supervisors entered. The record showed that the county had for seven or eight years levied and collected taxes to pay the interest, and had paid all the interest as it fell due up to the default stated in this case. Here, then, is almost a parallel case with our own—receiving stock and retaining same and voting it, levy and collection of taxes and payment of interest. The authority was not properly exercised, as the county court had no power or authority in the premises, it being alone the province of the Board of Supervisors to act, and yet the Supreme Court affirmed the judgment.

Clifford, J., on pages 781-2-3, says: "Ratification is "inoperative if the party attempted to be charged was not "competent to make the contract in question when the "same was made, nor when the supposed acts of ratifica- "tion were performed, or if the contract was illegal, im-

"moral or against public policy. * * * Such ratifica-
"tion may be by express consent, or by acts and conduct
"of the principal inconsistent with any other hypothesis
"than that he approved and intended to adopt what had
"been done in his name. * * *

"Where the officers of a corporation openly exercise
"power affecting the interest of third persons, which
"presupposes a delegated authority for the purpose, and
"other corporate acts subsequently performed, show that
"the corporation must have contemplated the legal exis-
"tence of such authority, the acts of such officers will be
"deemed rightful, and the delegated authority will be
"presumed.

"All of the acts of the Board of Supervisors of the
"county in making the subscription, purchasing the stock,
"issuing the bonds and exchanging the securities, appear
"to have been openly and well known to the corporation,
"and yet they constantly suffered themselves to be repre-
"sented in the choice of officers and in the management
"of all the affairs of the railroad company, and have vol-
"untarily voted taxes for the payment of yearly interest
"on the bonds, and *actually paid the same*, as admitted in
"the special plea.

"Examined in the light of those suggestions it would be
"difficult to imagine a case where the rule that a subse-
"quent ratification is as good as a previous authority, can
"be more justly applicable than in the case under consid-
"eration." To same effect see

Johnson v. Stark County, 24 Ills. 90.
Keithsburg v. Frick, 34 Ills. 421.

In the case of the County of Clay v. Society for Saving, MS. U. S. Supreme Court, October term, 1881, the case of

Supervisors v. Schenck, 7 Wallace 772, is expressly followed.

In Hatton v. Stewart, 2 B. J. Lea 235, ratification is thus defined: "Ratification can only be express, or by acts and conduct inconsistent with any other hypothesis than that he approved and intended to adopt what had been done in his name." To same effect see also

Hart v. Dixon, 5 B. J. Lea 339.

Bronson's Executor v. Chappell, 12 Wallace 683.

The defense in its rejoinder to the replications filed by plaintiff, sets out that whatever ratification it may have made was made in ignorance of its rights, etc.

It introduces no proof on the point and issue is expressly taken thereon. We might content ourselves with resting here, but the case of Walker v. Merriman was filed by the county court of defendant county before any such action was taken, and in fact the decision in that case had been made before any steps were taken that are relied upon as an estoppel or ratification here.

See that Record page ——. 81

Conceding that such acts of ratification were done by defendant, yet it insists that the same were inoperative and of no effect, because done after the constitution of 1870 went into effect.

Let us examine and see what there is in the objection as a matter of fact.

The constitution of 1870 went into effect 5th May, 1870.

See proclamation of the Governor.

Now the county court of defendant county had taken charge of the county property on November 15, 1869, and April 11, 1870, levied the tax of 20c for bonds and 20c for coupons on Miesissippi River R. R. Co. subscription.

See Record page ——. 31 - 33

And at same term appointed W. H. Walker, H. T. Jones and Hume F. Hill to vote the stock held by it in the meeting to be held 31 May, 1870.

See Record page ——. 34

And had paid on 19 March, 1870, $18,000 of coupons and $23,000 of bonds.

See Record page ——. 36

Then all these acts had been done before there is any pretense that there was any constitutional objection, in fact before the constitution of 1870 went into effect.

Another answer to this objection, if it in reality existed, would be that the acts of the General Assembly which authorized the counties through which this road ran, to make subscriptions without a submission of the proposition to the vote of the people, was a valid amendment to its charter, conferring new and additional privileges upon the company not in violation of the constitution, and as such were not rendered void by the constitution of 1870, nor impaired thereby.

County of Scotland v. Thomas, 4 Otto 682.
Tipton County v. Locomotive Works, 13 Otto 533.
Empire v. Darlington, 101 U. S. 87–91.

And such privileges to corporations not being unlawful under the constitution of 1834, under which they were

granted, were not abrogated or invalidated by the constitution of 1870, and still remain in full force.

Again it is objected, that no act of ratification could be effectual after 1870, as the constitution of the State was then amended, and the power of the county courts to impose such burdens made to depend on a popular vote and a majority of three-fourths of the votes cast.

We, however, insist that the acts done by the county court after November 15, 1869, and prior to the 5th May, 1870, (the date the constitution of 1870 went into effect), was a complete ratification of the subscription originally wrongful, and was in effect equivalent to a new subscription, to-wit:

Acceptance and retention of stock, and voting same.

Levy and collection of two taxes.

Payment of a large number of the bonds and coupons.

Apart from this, however, we reply that the constitution of 1870, does not, in terms or spirit, refer to subscriptions previously made, but expressly refers to subscriptions to be taken after its adoption. It left the county courts in full control of all previously made subscriptions and debts for them.

See 8 Ohio State R. 304.
11 Ohio State R. 25.
41 Missouri R. 457.
44 Missouri R. 553.
51 Missouri R. 581.
54 Missouri R. 58 to 67.
2 Ohio State 607–647.
14 Ohio State 472.
13 B. Munroe 1.
23 Minn. 422.

And this construction has been followed by the Supreme Court of the United States in

County of Callaway v. Foster, 93 U. S. 567.
County of Scotland v. Thomas, 94 U. S. 688.
County of Henry v. Nicolay, 95 U. S. 619.
County of Macon v. Shores, 97 U. S. 99.
County of Schyler v. Thomas, 98 U. S. 166.
Supervisors v. Galbreath, 99 U. S. 214, 100 U. S. 47, 96 U. S. 684.

The terms of Art. II, sec. 29, of constitution of 1870, are prospective only, and in no way impair previous grants of power. The language is almost the same as in the constitution of Missouri, which has been so construed.

See above authorities.

Article II, section 29, of our constitution of 1870, which is relied upon as inhibiting such a ratification, reads as follows: * * "But the credit of no county, city or town shall be given or loaned to, or in aid of, any person, company, association or corporation, except upon an election to be first held by the qualified voters of such county, city or town, and the assent of three-fourths of the votes cast at said election. Nor shall any county, city or town become a stockholder with others in any company, association or corporation, except upon a like election, and the assent of a like majority."

Article XI, section 1, reads thus: "All laws and ordinances now in force and in use in this State not inconsistent with the constitution, shall continue in force and use until they expire, or be altered or repealed by the Legislature. But ordinances contained in any former constitution or schedule thereto, are hereby abrogated."

Article I, section 20, reads, "That no retrospective law, or law impairing the obligation of contracts, shall be made."

Constitutions, like statutes, shall only operate prospectively, unless the words used clearly show that it was the intention that they should act retrospectively.

Cooley's Limitations p. 62.

Collins v. E. T., Va. & Ga. R. R., 9 Heiskell 843.

In July, 1865, by a new constitution in Missouri, it was provided, "The General Assembly shall not authorize any county, city or town to become a stockholder in, or to loan its credit to, any company, association or corporation, unless two-thirds of the qualified voters of such county, city or town at a regular or special election to be held therein, assent thereto." * * *

"All statute laws of the State now in force, not inconsistent with the constitution, shall continue in force until they expire by their own limitations, or be amended or repealed by the General Assembly."

Being substantially, if not literally, the same provisions that are found in our constitution of 1870.

In County of Callaway v. Foster, 93 U. S. 567, suit was brought to enforce bonds issued by the county of Callaway. The bonds were issued in pursuance of Acts of March, 1859, amended in 1868, the bonds actually being issued in 1869, four years after the constitution of July, 1865, went into operation, the subscription being made in 1868.

Hunt, J., on page 570 says: "It has been held in many cases by the Supreme Court of Missouri that the provision of the constitution of 1865, prohibiting loans or subscrip-

tion of stock except with the assent of the electors, is prospective and not retroactive; and the charter of a company which is in existence before the adoption of the constitutional provision, is not affected by it, but the power given by it remains as if no such constitution existed. State v. Macon County Court, 41 Mo. 453. Smith v. County, 9 Clark, 54 id. 58. Although put into execution by making the subscription, or issuing the bonds, after the adoption of the constitution, the power remains valid."

In County of Scotland v. Thomas, 94 U. S. 688, another Missouri case where the same defence now asserted by Shelby county was interposed, Bradley, J., in disposing of this question, says, on page 688: "The clause of the constitution on which the defendant relies, is the 14th section of Art. XI, and is as follows: 'The General Assembly shall not authorize any county, city or town to become a stockholder in, or to loan its credit to, any company, association or corporation, unless two-thirds of the qualified voters of said county, city or town, at a regular or special election, to be held therein, shall assent thereto.' This prohibition, it will be observed, is against the Legislature's authorizing municipal subscription or aid to private corporations. It does not purport to take away any authority already granted. It only limits the power of the Legislature in granting such authority for the time to come. This has been settled in the Supreme Court of Missouri, in several well considered decisions."

See State v. Sullivan county, 51 Mo. 522.

State v. Green county, 54 id. 540.

"In the former case the court say: 'Power conferred on counties to take and subscribe stock without a submission

to a vote of the people before the constitution went into operation, remained unaffected by that instrument.' The same view was taken by this court in the recent case of County of Callaway v. Foster, 93 U. S. 567. See also State v. Marysville and Lexington Railroad Company, 13 B. Munroe, Ky. 1."

Similar decisions upon this constitution of Missouri, in which the Supreme Court of the United States hold that the laws in force prior to its adoption were not affected thereby, are to be found in—

95 U. S. 619.
96 U. S. 675.
97 U. S. 272.

In Supervisors v. Galbreath, 99 U. S. 214:

The county of Calhoun, in the State of Mississippi, was authorized, in 1860, to make a subscription to the railroad, and an election was had and failed for want of the requisite majority.

On December 1, 1869, a constitutional provision was adopted, as follows:

"Sec. 14. The Legislature shall not authorize any county, city or town to become a stockholder in, or to lend its credit to, any company, association or corporation, unless two-thirds of the qualified voters of such county, city or town, at a special election, or regular election, to be held therein, shall assent thereto."

After this, in 1871, an amendatory act was passed, changing the payees of the bonds, and the bonds were issued.

Swayne, J., delivering the opinion, on p. 219, says:

"The learned counsel for the plaintiff in error asserts that this section abrogated the act of 1860, and avoids the bonds.

"It will be observed that the language of the section is wholly prospective.

"It is, in effect, that the Legislature shall not, in the future, authorize any county, city or town (without the consent of two-thirds of the legal voters) to do either of two things: 1, become a stockholder in any company, association or corporation; 2, lend its credit to any company, association or corporation.

"The restraint is upon the Legislature. It is forbidden to do thereafter either of the two prohibited things."

And the court held the county liable.

See same principle in a case arising upon the constitution of Illinois. Fairfield v. County of Gallatin, 100 U. S. 47.

However, if the court had not the power after May, 1870, to make such subscription without the assent of three-fourths of the voters, yet still as the representative of the county, it could bind it by ratifying what had before been imperfectly done. To the extent of the payments made amounting to more than two-thirds of the original debt, the court has certainly bound the county. The entire absence of all resistance to these tax levies by the taxpayers, is conclusive that they approved the action of the court.

Under Code 402, the Justices, in *County Court assembled*, "were still *authorized to act*" for the county corporation, after the constitution of 1870, as before.

In the case at bar the stock had been subscribed for and issued, and the county had it, and the railroad company had the bonds, or they had sold them, and the county had actually paid $18,000 of the coupons and $23,000 of the

bonds before the constitution went into effect, on May 5, 1870.

It was an executed contract, and the constitution of 1870 had no bearing on it.

III.

That said county fully ratified the acts of the said Board of County Commissioners in making said subscription and issuing said bonds and estopped itself from controverting its liability upon these bonds, when, at the October term, 1871, it expressly agreed to the consolidation of the Mississippi River Railroad with the Paducah and Gulf Railroad Company, and assured the latter railroad and the plaintiff, then the president and a large owner thereof, that these bonds, the assets of the former railroad, would be paid, and thereby induced it to effect a consolidation upon the representation that its said bonds were valid obligations and would be paid.

That it made such agreement, see deposition of W. W. McDowell, the county attorney, who says :

"I was county attorney for Shelby county in 1871, and as such was nearly always present when any question of importance was brought before the quarterly terms of the county court of said county. At the October term, 1871, of said court, which was a quarterly term, Ex. Norton, the plaintiff in the above named suit, came before that court and asked the privilege of making a statement to it, which was granted; when he stated that he and his brothers owned a controlling interest in a railroad then called the Paducah and Gulf Railroad Company, which was then completed from Paducah to Troy Station. He

stated the distance, but I do not remember it. He also stated that it was free from incumbrance, and that he was the president of it. He further stated to the court that negotiations were pending to consolidate said road with the Mississippi River Railroad Company, and that he and his associates were willing to consolidate their road with the Mississippi River Railroad, which then existed only on paper, and whose assets consisted chiefly of the county subscriptions along the line of the road, provided Shelby county would continue to make the levies of taxes to meet her bonds, then amounting to $250,000 or thereabouts; but he stated to the court in very emphatic terms that he and his associates would not go into such a consolidation unless said bonds were to be paid, and the suspended tax which had been levied at the previous April term and suspended at the July term was then relevied, which, if done, he would take as an assurance upon the part of the court and county that provision would be made to meet the bonds and coupons as they matured. There was much discussion between the members of the court, and questions to and replies from Norton; and Esq. W. H. Walker took strong grounds against recognizing the bonds or levying a tax. After which Mr. Norton again stated that while he desired to make the consolidation and then proceed with the building of the road from Memphis toward the terminus of his road at Troy station, yet he desired the court to fully understand that no consolidation would be made unless the county would at once make provision for the payment of remaining outstanding bonds which had been issued in the name of the county to the Mississippi River Railroad Company, and the county take stock in the consolidated road in lieu and in place of that held by

it in the Mississippi River Railroad Company. After a further interchange of views, a motion was made to relevy a tax for the year 1871 to pay the accrued interest and past due bonds or bonds soon to mature and become due, when the following order was made:

"'Ordered, that the order of the court made at the July term, 1871, suspending the collection of the tax levied to pay the subscription of Shelby county to the capital stock of the Mississippi River Railroad Company, be and the same is hereby rescinded, and the tax collector is hereby instructed to proceed with the collection of said tax of fifteen cents on the hundred dollars as already assessed, and that when collected the same shall be held subject to be paid over to the parties entitled to receive it, on the order of the chairman of the court whenever he shall have satisfactory evidence that the work on the road from Memphis to the north line of Shelby county is under contract and in process of construction, the money to be paid out only on the estimates of the chief engineer.'

"This order I see in the printed order of the court made in reference to said Mississippi River Railroad matter, and is correct as I now remember it.

"The order was made as an assurance to Mr. Norton of the purpose of the county through its court that provision would be made for the payment of said bonds as they matured.

"And the consolidated company called, I believe, the Paducah and Memphis Railroad Company, issued its stock to the county of Shelby in lieu of the stock in the old Mississippi River Railroad Company, which was accepted and voted by the county of Shelby. The facts as detailed above are substantially correct. I cannot, of course, give the exact

language used by Mr. Norton when he made his statements to the court, but I have given the substance and import of what he said. I resided in Shelby county in 1871, and am and was then acquainted with the plaintiff."

And Ex. Norton shows that he acted on it. He says: "I did go before the county court of Shelby county, Tennessee, at the October term of that court in 1871, in reference to the bonds issued to the Mississippi River Railroad Company. In the summer of the year 1871, proposals by the Mississippi River Railroad Company were made to the Paducah and Gulf Railroad Company for a consolidation of the properties, franchises and assets of the two corporations. My object in going before the county court of Shelby county, was to ascertain if the bonds and coupons would be paid as they matured, and if there was any question in regard to them. The interest that I represented at that time, was that of the Paducah and Gulf Railroad Company, being president of that corporation and the owner of four-tenths of all its stock, and my brothers owned about three-tenths. I stated to the court the facts as to said pending proposals for the consolidation of the two railroad companies' properties, franchises and assets; that I was an owner of a large portion of said Paducah and Gulf Railroad Company's properties, franchises and assets; that the said Paducah and Gulf Railroad Company was a completed line of railroad extending from Paducah, Ky., to Troy Station, now Reeves, in Obion county, Tennessee, a distance of about sixty-three miles; that the road was completed and equipped and was in active operation and was unincumbered and clear of debt. I distinctly stated to the court that before putting my property and the prop-

erty of others in such consolidation with the Mississippi River Railroad Company, I wished to know definitely what that county wanted to do as to the bonds issued by it to said Mississippi River Railroad Company, as those bonds constituted a large part of the assets of the Mississippi River Railroad Company. I also said positively to that court at that time, that if there was any doubt about that county paying said bonds, I wanted to know it, and that in that case I would oppose the proposed consolidation; that I did not intend to put the Paducah and Gulf Railroad Company into the consolidation without these bonds were to be paid, and that as I was one of the principal owners in the said Paducah and Gulf road, owning four-tenths thereof, the consolidation would not be made without my consent. There was some discussion between the members of the court as to the building of the line of road, and Esquire Walker made some point as to the faithful application of the moneys to be paid by the county of Shelby in work on the road. Before I left the court room, the court by a vote, I think, of twenty-three ayes to seven noes, adopted an order levying a tax to meet the next maturing instalment of these bonds and interest, and I was assured by many members of the court that the whole would be paid. They seemed anxious to have the consolidation effected and the road completed. The only apprehension manifested by any person was that the moneys paid would not be spent on the work of the road."

"The effect produced upon me was to satisfy me that there was no objection to the payment of the bonds, and that they would be paid, and that the consolidation was approved by the county court. At a subsequent meeting of the stockholders of the Paducah and Gulf Railroad, I

reported what had occurred, as stated above, at my meeting with the county court, and the stockholders of the Paducah and Gulf Railroad approved the plan of consolidation. I considered the levying of the tax to pay the maturing bonds and interest was an evidence of good faith on the part of Shelby county, and the subsequent return of its stock in the Mississippi River Railrod Company, and its acceptance of the stock of the consolidated corporation, its voting its stock in favor of the consolidation, was also evidence of its good faith. I voted in favor of the consolidation, as did my brothers, to whom I stated what had happened in my interview with the county court. This neither of us would have done had the action of the Shelby county court, or the vote of the county on its stock, been the reverse of what they were."

We ask the attention of the court to the fact that the defence does not rest upon any fraud going to or affecting the consideration. No failure of consideration is set up. The county received and has continued to hold the stock up to this time. Not only the $300,000 subscribed was expended on this road in Shelby county, but over $100,000 more. Not until the work had been progressing more than twelve years, and was complete through the county and the cars running, was any objection made, and then it was and is wholly confined to the mode of execution.

We quote the language of the Supreme Court of the United States, as follows: "The taxpayers saw the large expenditures, and yet took no steps to arrest them. Not until the works were completed, and the securities had passed into the hands of bona fide purchasers, did they move in the matter. If they had been invited to action as

soon as the contract was made, they would have saved a heavy debt, and innocent persons would not have suffered."

22 Wallace R., 68, A.D. 1874, Ritchie v. Franklin County.

We insist that the record shows that, in October, 1871, the county court of Shelby county was informed, by the Paducah and Gulf Railroad Company, through its president, that with a completed road from Paducah, Kentucky, to Troy, Tennessee, worth $1,000,000, and absolutely free of debt, this Paducah and Gulf Railroad Company was about to, and would, consolidate with the Mississippi River Railroad Company, if these county bonds were valid debts and would be paid. Said county court of Shelby county, being so informed, did agree to said consolidation, and levied the tax to pay the bonds; and, induced thereby, the Paducah and Gulf Railroad Company did consolidate with the Mississippi River Railroad Company, in 1872, and the consolidated company took said bonds under the consolidation. The record further shows, that the officers of Shelby county, in the convention of the stockholders of the Mississippi River Railroad Company, voted the $300,000 of stock in favor of the consolidation. The consolidation was effected. Then the county surrendered its certificate of stock in the Mississippi River Railroad Company, and accepted, in lieu, a certificate for the like amount of stock in the consolidated company, the Paducah and Memphis Railroad Company.

After this the bonds were delivered over to the new consolidated company, who sold them to plaintiff before maturity and for value, with full knowledge of and relying upon the assurances of defendant that they would be paid and were valid and binding obligations.

This conduct was a representation of the most solemn and avowed character, by the defendant, to one about to purchase said bonds, that they were good, valid and binding, whereby this third party was induced to purchase said bonds, and, hence, they are binding on said county, both in the hands of such purchasers, and of its assignee, the plaintiff.

And this is so, although the county court was, at the time of this conduct, ignorant of the original infirmities now set up.

One who has bought a note after due, under assurances of its validity from the maker, may recover from the maker the full amount, although it was bought at a discount, and was invalid in the hands of the payee.

Tobey v. Chipman, 13 Allen 123.

1 Greenlf. on Evidence, sec. 207–8, reads as follows:

"Admissions, whether of law or fact, which have been acted on by others, are conclusive against the party making them, in all cases between him and the person whose conduct he has thus influenced. *It is of no importance whether they were made in express language to the person himself, or implied from the open and general conduct of the party, etc.*"

5 Miss. (6 How.) R. 479, A.D., 1840. Land's Adm'r. v. Lacoste, et al. Opinion by Ch. J. Sharkey.

Land, in 1836, made three notes to Marshall for $18,000 each, due 1st of March, 1838, 1st March, 1839, and 1st March, 1840, for a tract of land and some slaves, and gave a deed of trust on the same property to secure the notes. He paid the first note. Carmichael, before the second note fell due, being about to buy the second and third notes,

inquired of Land, the maker, if he would pay them at maturity. He replied there was a defect of title, but he had no doubt the vendor would cure it. Afterward Land made some arrangements with Marshall, the vendor, as to this defect, and then informed Carmichael the defect was cured and the notes would be paid. Thereupon Carmichael took the notes in part security for debt due from Marshall to Carmichael. When the second note fell due Land paid $10,000 on it and died. Lacoste, the trustee, on the maturity of the third note, advertised the trust property for sale, to satisfy the balance of the second and the third note. Land's administrator filed a bill to enjoin the sale, for the reason that the defect, as a matter of fact, had not been cured. The relief was refused, the court saying Land assured the assignee that the difficulty was obviated, and he would make no defence against them, in consequence of which promise the assignment of the note was taken; whatever equity Land might have had against Marshall was certainly waived as to the assignee. Such a promise to one about to take an assignment is binding on the party making it, and a waiver of his equity, even without further knowledge of the failure of consideration than such as the party must have had by the making of the contract, and knowing the consideration for which the notes were given. The excuse of ignorance of consideration cannot be urged for Land.

5 Miss. R. (6 How.), 720–1–2–3. A.D. 1841. Hamer v. Johnson et al. Ch. J. Sharkey, opinion:

"The doctrine of this case is exactly as above. Hamer made and gave Davis his two promissory notes for $9669, as the price for land, for which Davis executed his title

bond to Hamer. Davis had no title to the land, but Hamer was ignorant of this. Pierce being about to buy the notes of Davis, before due, asked Hamer if the notes were good, and would be punctually paid when they fell due. Hamer assured him they would. Pierce on this assurance, bought the notes and paid eighteen slaves for them. Afterward Pierce sold and assigned the notes to Johnson, telling him of Hamer's assurance. Johnson, the second assignee, sued Hamer on the notes. The latter defended on the ground of total failure of title to the land in Davis. Johnson replied the above assurance to Pierce by Hamer and his purchase from Pierce. Hamer proved his ignorance of the defect of title when he made the assurance to Pierce. Court held Hamer estopped by the assurance, as Pierce and Johnson acted on it, notwithstanding Hamer's ignorance of the defect.

"If a purchaser make the proper inquiry of the maker, who is supposed by the law to know the consideration and the defence, and he states that the money will be paid, this is calculated to inspire confidence, and justice requires that such representation shall estop him from resisting payment on the ground of failure of consideration. The policy is to encourage, rather than check the negotiability of mercantile paper. Its circulation would be greatly embarrassed if the maker be permitted, in the face of his assurances to the contrary, to go into the consideration against an innocent holder, who purchased honestly, relying on the statement of the maker that it would be paid." p. 728.

2 Yeates (Penn.) R. 541. A.D. 1800. Carnes v. Field, Opinion by Yeates, J.

Field made a bond for £282, 5s 4½d to Carnes, part price for land assured by title bond. Carnes assigned this bond for value before due to Joshua R. Bond, who, before he bought the bond, inquired of Field, the obligor, if the bond would be paid at maturity. Field said it would. It was discovered before the bond fell due that Carnes had no title to the land. Held no defence against the assignee. The court say, at p. 543: "Where the obligor represents the money thereon as justly due, to a person desirous of taking an assignment, and engages to pay the same, in faith and confidence whereof the assignment is procured, the former takes on himself the risk of the adequacy of the consideration and the fairness of the original transaction, and relinquishes any objection he might otherwise have on those grounds. *Such conduct is virtually a new contract, and forms an exception to the general rule.*"

1 Wash. (Va.) R. 296, A.D., 1793. Buckner v. Smith. Lyons, J.

An assurance of payment to one who was about to take an assignment of a bond was held to be binding, although the bond had been given for a gaming consideration, and was absolutely void by statute.

Same case is reported in Hamer v. Johnson, 1 Smedes and M. Ch. R. 563.

1 Dan. Negotiable Instruments, 859.

"There are some cases in which defences, which would avoid the instrument in any one's hands, are rendered unavailable by his own conduct, cases in which, to use the legal phrase, he is estopped from pleading the particular

defence which he endeavors to set up. Thus, if a person who is negotiating with the payee or endorsee of a note for the purchase of it, inquire concerning its validity, of the maker, and the latter assure him that the note is good; that he has no defence against it; that it is good business paper, or that it is all right, and will be paid, the maker cannot afterwards plead that it was usurious or otherwise illegal. His mouth is closed by his previous representations, and the law will not assist him to lead another into a pitfall, and then make him a scapegoat for himself, and so, if the holder purchases the note with the defendant's knowledge and consent, it has been held that the latter cannot set up prior payment, or other defence against it."

To same effect see Davis v. Thomas, 5 Leigh Va. R.
1 Brooks v. Martin, 43 Ala. 360.

In Lynch v. Kennedy, 34 N. Y. 152, Porter, J., says:

"It was affirmatively proven that the plaintiff was a "*bona fide* holder of the note, and that he purchased it on "the faith of the defendant's written statement, that it was "business paper, and that it would be paid at maturity. "It was immaterial, therefore, whether any defence existed "between the original parties."

When a forged note is on the market, and a party desiring to buy asks the alleged maker, and he answers it will be paid, and the purchase is then made, the maker is estopped to make the defence of forgery.

Court v. DeWolf, 1 Rhode I. 393.

Where one purchasing a note asks the maker if he has any defence and he replies no, the estoppel arising on the

foregoing facts is available, and runs with the paper into the hands of any subsequent purchaser.

Rose v. Hurley, 39 Ind. 82.

McCabe v. Rainey, 32 Ind. 312.

Simpson v. Moore, 5 B. J. Lea 372.

If the party who transferred the instrument to the holder acquired the note before maturity and was himself unaffected by any infirmity in it, the holder acquires as good a title as he held, although it was overdue and dishonored at the time of transfer.

1 Dan. Neg. In., secs. 726–803.

In Cromwell v. County of Sac, 96 U. S. R., p. 59, Field, J., holds that "Whenever negotiable paper has passed into the hands of a party unaffected by previous infirmities, its character as an available security is established and its holder can transfer it to others with the like immunity. His own title and right would be impaired if any restrictions were placed upon his power of disposition."

In County of Tipton v. Locomotive Works, 13 Otto 528, the question here under consideration was decided upon almost the same state of facts that exists in the present case. Harlan, J., delivering the unanimous opinion of the court, in treating upon this subject on page 538, says:

"The acceptance by the county court of the terms and conditions set forth in the proposition of Sept. 30, 1871, and its participation, under the circumstances averted to by its authorized representatives, in the proceedings which resulted in the consolidation, whereby the situation of the Paducah and Gulf Railroad Company became materially altered, was, in effect, a representation to those interested

in that company, that the county would not withhold payment of its bonds and coupons, but would meet them according to the terms of the new agreement."

"By its conduct it induced those interested in the Paducah and Gulf Railroad Company, then solvent, out of debt, and owning and operating a complete railroad from Paducah, Kentucky, to Troy, Tennessee, worth $1,000,000, to believe that the bonds would constitute a part of the available assets of the new company. The defendants received a portion of these bonds as early as March 15, 1873. The integrity of the business transaction by which they acquired them is not questioned by any evidence recited in the record.

"Nor does it appear that any evidence was offered that impugned in any degree the good faith, in respect of these matters, of those who controlled the Paducah and Gulf Railroad Company, or of those who controlled the Paducah and Memphis Railroad Company, subsequent to the consolidation in 1872.

"The defendants in error obtained the bonds in suit from the Paducah and Memphis Railroad Company, paying value therefor, and, so far as the record discloses, without any reason to suspect their payment would be resisted by the county.

"In view, then, of the conduct, throughout all these proceedings, of those who represented the county of Tipton, it is estopped, by every consideration of law, justice and fair dealing, from disputing its liability to defendants in error upon the bonds in suit. The discovery by the county, in February, 1875, of fraud and corrupt practices upon the part of the Mississippi River Railroad Company, in procuring the issue of the bonds in 1869, cannot be permitted

to affect the rights of those who had, in good faith, acquired the bonds in reliance upon the explicit assurances which the county, in effect, gave in October, 1871, that it would provide for the payment of the bonds and their coupons."

We insist that the last case decided upon the same statute, and identical representations here relied upon, is necessarily conclusive of the one in hand, all other questions out of consideration.

IV.

The only other consideration is that from the date of the subscription and issuance of the bonds to the present time, neither the defendant county nor any citizen or taxpayer thereof, have ever begun any suit to cancel, annul or question said subscription or said bonds, nor have there been any legal proceedings instituted by either county or citizens to question or prevent the collection of taxes levied to pay for said bonds or to prevent the issuance or payment of said bonds and coupons.

J. A. Taylor, county attorney for defendant, shows that no taxpayer ever took any steps to resist the taxes or prevent the issue or payment of bonds by suit or otherwise.

See Bill of Exceptions, Record p. ——. 80

In conclusion, we ask the attention of the court to the fact that the defence does not rest upon any fraud going to or affecting the consideration, No failure of consideration is set up or plead. The county reserves and has continued to hold the stock up to this time. Not only the $300,000 subscribed was expended on this road in Shelby county, but more than $100,000 in addition.

Not until the work had been finished and the cars running through the county, was any objection made, and then it was and is wholly confined to the mode and manner of execution.

It is now too late to call same in question.

19 Wallace 241. 22 Wallace 68.

We, therefore, confidently ask a reversal.

D. H. POSTON & W. K. POSTON,
Attorneys for Plaintiff in Error.

EXHIBIT No. 1.

Being Laws of Tennessee Authorizing County Subscriptions to Mississippi River R. R. Company.

CHAPTER XLVIII.

AN ACT for the benefit of the Winchester & Alabama Railroad Company, and for other purposes.

* * * * * * * *

Sec. 6. *Be it further enacted*, That the county court of any county through which the line of the Mississippi River Railroad is proposed to run, a majority of the justices in commission at the time concurring, may make a corporate or county subscription to the capital stock of said railroad company, of an amount not exceeding two-thirds of the estimated cost of grading the road-bed through the county and preparing the same for the iron rails; the said cost to be verified by the sworn statement of the president or chief engineer of said company. And after such subscription shall have been entered upon the books of the railroad company, either by the chairman of the county court, or by any other member of the court appointed therefor, the court shall proceed without further reference or delay, to levy an assessment on all the taxable property within the county, sufficient to pay said subscription; and the same shall be payable in three equal annual instalments, commencing with the fiscal year in which said subscription shall be made. And it shall be lawful for county courts making subscriptions as herein provided, to issue short bonds to the railroad company, in

anticipation of the collection of the annual levies, if thereby construction of the work may be facilitated; and in all other respects, except as herein specially provided, the capital stock of said railroad company to be subscribed by counties, shall be governed by the general internal improvement laws of the State.

* * * * * * * *

Sec. 9. *Be it further enacted*, That this act shall take effect from and after its passage.

Passed, February 25, 1867.

EXHIBIT No. 2.

CHAPTER VI.—ACTS OF 1867.

AN ACT for the benefit of the Mississippi River Railroad Company.

Section 1. *Be it enacted by the General Assembly of the State of Tennessee*, That the sixth section of an act passed on the 25th day of February, 1867, entitled, "An act for the benefit of the Winchester and Alabama Railroad Company, and for other purposes," be and is hereby amended as follows, to-wit:—That the subscription authorized in said sixth section to be made to the capital stock of the Mississippi River Railroad Company, by the counties along the line of said railroad, may be made at any monthly term of the county courts of said counties, or at any special term of said courts; provided, that a majority of all the justices in commission in the counties respectively shall be present when any such subscription is made; and provided, further, that a majority of those present shall concur therein.

Sec. 2. *Be further enacted*, That the charter of the Mississippi River Railroad Company be and hereby is so amended as that the said company may commence the line of their railroad at any point on the line of the Memphis and Ohio Railroad, not exceeding twelve miles from the city of Memphis; and the said Mississippi River Railroad Company are hereby authorized to enter into such contract with the said Memphis and Ohio Railroad Company, for entering the city of Memphis over the latter company's track, and for the use of a common depot, as may be convenient and profitable to the two companies.

Sec. 3. *Be it further enacted*, That this act shall take effect from and after its passage.

Passed, November 5, 1867.

EXHIBIT No. 3.

CHAPTER XLVI.—ACTS OF 1867.

* * * * * * * *

Section 21. *Be it further enacted*, That there shall be established in the county of Shelby, in this State, a Board of County Commissioners, to consist of five persons, etc.

* * * * * * * *

Sec. 25. *Be it further enacted*, That all the powers and duties which are now vested in and performed by the quarterly court of said county, shall be vested in the said board of commissioners; and in addition to the power, now conferred by law, shall have authority * * * * to subscribe stock to railroads which the county court of Shelby county has been authorized by general or special laws to subscribe, and under the same conditions and restrictions; and to represent such stock in all elections for

directors, and to provide for the payment of subscription as made.

* * * * * * * *

Passed, March 7, 1867.

EXHIBIT No. 4.

CHAPTER XLV.—ACTS OF 1868–1869.

* * * * * * * * * *

Sec. 28. *Be it further enacted*, That the stock authorized to be subscribed in the Mississippi River Railroad Company by the county courts or County Commissioners of the counties along the line of said railroad, may be payable in not exceeding six annual installments, instead of three, as now provided by law.

* * * * * * * * * *

Passed February 12, 1869.

EXHIBIT A.

CONSTITUTION OF 1796.

ARTICLE V.

1. The judicial power of the State shall be vested in such superior and inferior courts of law and equity, as the Legislature shall, from time to time, direct and establish.

2. The General Assembly shall by joint ballot of both houses appoint judges of the several courts of law and equity, also an attorney or attorneys for the State, who shall hold their respective offices during their good behavior.

3. The judges of the superior court shall, at stated times, receive a compensation for their services, to be ascertained by law; but shall not be allowed any fees or perquisites of office, nor shall they hold any other office of trust or profit under this State, or the United States.

4. The judges of the superior courts shall be justices of oyer and terminer and general jail delivery throughout the State.

5. The judges of the superior and inferior courts shall not charge juries with respect to matters of fact, but may state the testimony and declare the law.

6. The judges of the superior courts shall have power, in all civil cases, to issue writs of certiorari, to remove any cause, or a transcript thereof, from any inferior court of record into the superior, on sufficient cause, supported by oath or affirmation.

7. The judges or justices of the inferior courts of law shall have power, in all civil cases, to issue writs of certiorari, to remove any cause, or a transcript thereof, from any inferior jurisdiction into their court, on sufficient cause, supported by oath or affirmation.

8. No judge shall sit on the trial of any cause where the parties shall be connected with him, by affinity or consanguinity, except by consent of parties. In case all the judges of the superior court shall be interested in the event of any cause or related to all or either of the parties, the governor of the State shall in such case especially commission three men, of law knowledge, for the determination thereof.

9. All writs and other process, shall run in the name of the State of Tennessee; and bear teste, and be signed by the respective clerks. Indictment shall conclude *against the peace and dignity of the State.*

10. Each court shall appoint its own clerk, who may hold his office during good behavior.

11. No fine shall be laid on any citizen of this State that shall exceed fifty dollars, unless it shall be assessed by a jury of his peers, who shall assess the fine at the time they find the fact, if they think the fine ought to be more than fifty dollars.

12. There shall be justices of the peace appointed for each county, not exceeding two for each captain's company, except for the company which includes the county town, which shall not exceed three, who shall hold their offices during good behavior.

ARTICLE VI.

1. There shall be appointed in each county, by the *county court*, one sheriff, one coroner, one trustee, and a sufficient number of constables, who shall hold their offices for two years. They shall also have power to appoint one register and ranger for the county, who shall hold their offices during good behavior. The sheriff and coroner shall be commissioned by the governor.

2. There shall be a treasurer or treasurers appointed for the State, who shall hold his or their offices for two years.

3. The appointment of all officers not otherwise directed by this constitution, shall be vested in the Legislature.

EXHIBIT B.

CONSTITUTION OF 1834.

ARTICLE VI.

Judicial Department.

Section 1. The judicial power of this State shall be vested in one Supreme Court; in such inferior courts as the Legislature shall, from time to time, ordain and establish, and the judges thereof; and in justices of the peace. The Legislature may also vest such jurisdiction as may be deemed necessary in corporation courts.

Sec. 2. The Supreme Court shall be composed of three judges, one of whom shall reside in each of the grand divisions of the State; the concurrence of two of said judges shall, in every case, be necessary to a decision. The jurisdiction of this court shall be appellate only, under such restrictions and regulations as may, from time to time, be prescribed by law; but it may possess such other jurisdiction as is now conferred by law on the present Supreme Court. Said courts shall be held at one place, and at one place only, in each of the three grand divisions in the State.

Sec. 3. The judges of the Supreme Court shall be elected by the qualified voters of the State at large, and the judges of such inferior courts as the Legislature may establish shall be elected by the qualified voters residing within the bounds of any district or circuit to which such inferior judge or judges, either of law or equity, may be assigned by ballot, in the same manner that members of the General Assembly

are elected. Courts may be established to be holden by justices of the peace. Judges of the Supreme Court shall be thirty-five years of age, and shall be elected for the term of eight years.

Sec. 4. The judges of such inferior courts as the Legislature may establish shall be thirty years of age, and shall be elected for the term of eight years.

Sec. 5. An attorney general of the State shall be elected by the qualified voters of the State at large, and the attorney for the State for any circuit or district to which a judge of an inferior court may be assigned, shall be elected by the qualified voters within the bounds of such district or circuit, in the same manner that members to the General Assembly are elected; all said attorneys, both for the State and circuit or district, shall hold their offices for the term of six years. In all cases where the attorney for any district fails or refuses to attend and prosecute according to law, the court shall have power to appoint an attorney *pro tempore*.

Sec. 6. Judges and attorneys for the State may be removed from office by a concurrent vote of both houses of the General Assembly, each house voting separately; but two-thirds of all the members elected to each house must concur in such vote; the vote shall be determined by ayes and noes, and the names of the members voting for or against the judge or attorney for the State, together with the cause or causes of removal, shall be entered on the journals of each house respectively. The judge or attorney for the State, against whom the Legislature may be about to proceed, shall receive notice thereof, accompanied with a copy of the causes alleged for his removal, at least ten days be-

fore the day on which either house of the General Assembly shall act thereupon.

Sec. 7. The judges of the Supreme and inferior courts shall, at stated times, receive a compensation for their services, to be ascertained by law, which shall not be increased or diminished during the time for which they are elected. They shall not be allowed any fees or perquisities of office, nor hold any other office of trust or profit under this State, or the United States.

Sec. 8. The jurisdiction of such inferior courts as the Legislature may, from time to time, establish, shall be regulated by law.

Sec. 9. Judges shall not charge juries with respect to matters of fact, but must state the testimony and declare the law.

Sec. 10. The judges or justices of such inferior courts of law as the Legislature may establish, shall have power in all civil cases to issue writs of *certiorari* to remove any cause or transcript thereof, from any inferior jurisdiction, into said court, on sufficient cause, supported by oath or affirmation.

Sec. 11. No judge of the Supreme or inferior courts shall preside on the trial of any cause in the event of which he may be interested, or where either of the parties shall be connected with him by affinity or consanguinity, within such degrees as may be prescribed by law, or in which he may have been of counsel, or in which he may have presided in any inferior court, except by consent of all the parties. In case any or all the judges of the Supreme Court shall be thus disqualified from presiding on the trial of any cause or causes, the court, or the judges thereof, shall certify the same to the Governor of the State, and he

shall forthwith specially commission the requisite number of men, of law knowledge, for the trial and determination thereof. In case of sickness of any of the judges of the Supreme or inferior courts, so that they or any of them are unable to attend, the Legislature is authorized to make provision, by general laws, that special judges may be appointed to attend said courts.

Sec. 12. All writs and other process shall run in the name of the State of Tennessee; and bear test and be signed by the respective clerks. Indictments shall conclude, "*against the peace and dignity of the State.*"

Sec. 13. Judges of the Supreme Court shall appoint their clerks, who shall hold their office for the period of six years. Chancellors (if courts of chancery shall be established) shall appoint their clerks and masters, who shall hold their office for a period of six years. Clerks of such inferior courts as may be hereafter established, which shall be required to be holden in the respective counties of this State, shall be elected by the qualified voters thereof, for the term of four years; they shall be removed from office for malfeasance, incompetency, or neglect of duty, in such manner as may be prescribed by law.

Sec. 14. No fine shall be laid on any citizen of this State that shall exceed fifty dollars, unless it shall be assessed by a jury of his peers, who shall assess the fine at the time they find the fact, if they think the fine should be more than fifty dollars.

Sec. 15. The different counties of this State shall be laid off, as the General Assembly may direct, into districts of convenient size, so that the whole number in each county shall not be more than twenty-five, or four for every one hundred square miles. There shall be two justices of the

peace and one constable elected in each district, by the qualified voters therein, except districts including county towns, which shall elect three justices and two constables. The jurisdiction of said officers shall be coextensive with the county. Justices of the peace shall be elected for the term of six, and constables for the term of two years. Upon the removal of either of said officers from the district in which he was elected, his office shall become vacant from the time of such removal. Justices of the peace shall be commissioned by the Governor. The Legislature shall have power to provide for the appointment of an additional number of justices of the peace in incorporated towns.

ARTICLE VII.

State and County Officers.

Section 1. There shall be elected in each county, by the qualified voters therein, one sheriff, one trustee, and one register; the sheriff and trustee for two years, and the register for four years: *Provided*, that no person shall be eligible to the office of sheriff more than six years in any term of eight years. There shall be elected for each county, by the *justices of the peace*, one coroner, and one ranger, who shall hold their offices for two years. Said officers shall be removed for malfeasance, or neglect of duty, in such manner as may be prescribed by law.

Sec. 2. Should a vacancy occur, subsequent to an election, in the office of sheriff, trustee, or register, it shall be filled by the *justices*; if in that of the clerk's to be elected by the people, it shall be filled by the courts; and the person so appointed shall continue in office until his successor shall be elected and qualified; and such office shall be filled

by the qualified voters at the first election for any of the county officers.

EXHIBIT C.

CONSTITUTION OF 1870.

ARTICLE VI.

Judicial Department.

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* * * * * * *

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Office Supreme Court U. S.
FILED
MAR 17 1886
JAMES H. McKENNEY
CLERK.

118-425

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 194.

EXTEIN NORTON,
Plaintiff in Error,

vs.

SHELBY COUNTY, STATE OF TENNESSEE,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

JOSEPH H. CHOATE,
Of Counsel.

IN THE

Supreme Court of the United States.

EXTEIN NORTON,
Plaintiff in Error,

vs.

SHELBY COUNTY, STATE OF TENNESSEE,
Defendant in Error.

No. 194.
October Term, 1885.

BRIEF FOR PLAINTIFF IN ERROR.

We assign for error that the Court below charged the jury to find a verdict for the defendant; whereas, upon the pleadings and evidence, the jury should have been instructed to find a verdict for the plaintiff for the amount due for principal and interest on the bonds in suit.

Statement of Facts.

The record discloses a case of flagrant repudiation. The plaintiff is the *bona fide* owner and holder for value of twenty-nine bonds of the defendant, with coupons attached, purporting to be issued by the defendant, as a *County in Tennessee*, signed by the *President of the Board of County Commissioners of Shelby County*, and attested by the seal of the *County* and the signature of the *Clerk* of the *County Court;* and the bonds recite on their face that they are (p. 4)

> " *Issued under and by virtue of Section* 6 *of an Act of the*
> " *Legislature of the State of Tennessee, passed February* 25, 1867,
> " *amended on the* 12*th day of February*, 1869, *and by authority*
> " *conferred upon the County Commissioners of Shelby County, by*
> " *Section* 25, *of an Act passed March* 9, 1867."

By the Act of February 25, 1867, legislative authority was conferred upon the *County of Shelby* to subscribe for

stock in the *Mississippi River Railroad Company*, and to issue its bonds therefor.

Such power could be exercised on the part of the *County* by the *County Court*, and by a further Act passed on November 5, 1867, amending the Act of February 25, 1867, the power conferred by such Act is recited to have been thereby conferred upon the *County*, and then slight modifications as to the issue of bonds are made by the amending Act.

In the meantime and on March 9, 1867, the Act for the reorganization of the City of Memphis and County of Shelby was passed, and by Section 25 of that Act there was created a Board of Commissioners for the *County*, in whom were vested all the powers and duties which had theretofore been exercised by the *County Court*, including all powers theretofore conferred upon the *County Court* by law; AND IN ADDITION THERETO *the Commissioners were vested with certain specified powers, among which was the power to subscribe on the part of the County for stock of railroads, for which the County Court had theretofore by general or special laws been authorized to subscribe, and to represent such stock in the meetings of the Railroad Companies, and to make provision for the payment of the subscriptions.*"

Immediately after the passage of this Act, the Commissioners thereby created, organized and held the regular terms of the *County Court* prescribed by the Act, and otherwise discharged the duties and functions imposed upon them until November 15, 1869, a period of two years and eight months, when by some means not disclosed by the record, they were ousted from office by the Justices of the Peace of the County, who, prior to the passage of the Act creating the Commissioners, had, under the Constitution and laws of Tennessee, acted as Judges of the County Court (p. 31).

These Justices of the Peace on April 9, 1867, had filed their bill in equity in the Chancery Court of Memphis, claiming that they, as Justices of the Peace, were by law entitled to hold the regular terms of the Quarterly Court of the County; but that on the first Monday of April, 1867, the date to which they had adjourned at the last

previous regular term of the Court, having met to open and hold the term of the Court, they found the defendant Commissioners in possession, assuming to hold the Quarterly Court, and unlawfully exercising the functions and powers of complainants when assembled as such Quarterly Court (pp. 81–87).

They charged the Commissioners with unlawfully usurping their places in said Court, and claimed that the Act of March 9th, 1867, creating the Commissioners was in violation of the Constitution, *so far as it attempted to transfer to the defendant Commissioners the judicial and legislative powers for the County*, which by the Constitution they claimed were vested in the plaintiffs assembled to hold the County Court (p. 82).

The decree entered by the Chancellor *prior* to the issue of the bonds in suit dismissed the bill (p. 87), and so the matter stood until after the Commissioners had subscribed for the stock of the Railroad Company and issued the bonds sued on, all the powers conferred upon the Commissioners by Section 25 of the Act of March 9, 1867, being continuously exercised by them without interruption until November 15, 1869 (pp. 20–30).

Prior to the issue of the bonds in 1869, the Commissioners *at the regular January Term of the Quarterly Court of the County held by them*, unanimously voted and subscribed for $300,000 of the stock of the Railroad Company, to be paid for in bonds of the County at their par value, and directed the President of the Board and the *County Clerk* to execute the bonds and deliver them to the Railroad Company—*which action appears duly recorded in the records of the Court for that term* (pp. 20–25).

In pursuance of these instructions the bonds were executed, the stock was received and the President was ordered to cast the vote of the County on the stock at the election for directors held in June, 1869 (p. 25).

On July 20, 1869, the President reported to the Board that he had delivered to the Company the last 250 of the bonds, including the bonds in suit, and had received certificates of stock in the Road therefor, making 3,000 shares in all (p. 29).

On August 13, 1869, the Commissioners levied a tax of

twenty cents on the $100 on account of the bonds (p. 30), and at the last meeting held by them, on October 26, 1869, they ordered the County Tax Collector to collect the tax imposed to pay the subscription (pp. 30–31).

On November 15, 1869, the Justices of the Peace of the County resumed their functions as holders of the Quarterly Court of the County. They took up and continued the business of the Court at the point where it had been left by the retiring Commissioners, and at the first meeting ordered that the Clerk countersign all county warrants which had been issued by the President of the Board on account of the appropriations prior to October 28, 1869, and also all jury warrants which had been regularly certified up to date (p. 31).

At the January Term, 1870, the Clerk of the County reported to the County Court that on the first $50,000 subscription to the Mississippi River Railroad Company, falling due January 1, 1870, a tax of twenty cents on each one hundred dollars' worth of taxable property had been levied to pay the same, and that the amount to be realized for the Railroad Company on account of this tax would exceed the amount of the subscription falling due, and that the tax so levied was by the action of the late Board of County Commissioners to be paid in currency (p. 32).

The tax books for the year 1869, containing the assessment and levy made by the late Commissioners, were submitted by the County Clerk, with his report, to the County Court, and besides collecting the tax levied by the Commissioners, the Court proceeded at the following April Term to levy a further tax of twenty cents on the one hundred dollars for the purpose of meeting the amounts due on the Mississippi River Railroad bonds, which tax was subsequently, at the same term, reduced to ten cents on the one hundred dollars, to be collected in cash (p. 33).

With the proceeds of the tax levied by the Commissioners and afterwards collected by the County Court, the latter body, in March, 1870, proceeded to pay the entire interest which had become due upon the whole issue of bonds on January 1, 1870, and $23,000 of the principal then falling due (p. 36).

At this point in the history of the case there went into

effect, on May 5, 1870, the new Constitution of Tennessee, of which the 29th Section of Article II. is claimed by the Defendant in Error to have rendered any further acts of ratification by the County impossible. It reads as follows:

> "But the credit of no county, city or town shall be given "or loaned to or in aid of any person, company, association or "corporation, except upon an election to be first held by the "qualified voters of such county, city or town, and the assent "of three-fourths of the votes cast at said election; nor shall "any county, city or town become a stockholder with others in "any company, association or corporation, except upon a like "election and the assent of a like majority."

But Section 1 of Article XI. of the same Constitution reads thus:

> "All laws and ordinances now in force and in use in this "State, not inconsistent with the Constitution, shall continue "in force and use until they expire or be altered or repealed by "the Legislature. But ordinances contained in any former "Constitution or schedule thereto are hereby abrogated."

After the adoption of these constitutional provisions, the County Court uniformly treated the issue of bonds, *of which those in suit, and fifty-nine others in suits which are to abide the event of this, are all that remain unpaid,* as the genuine and legal obligations of the County of Shelby.

FIRST.—They levied and collected the tax annually, and applied the same to the payment of the coupons as they fell due, and to the principal as it matured in the years between 1869 and 1875.

SECOND.—They thus paid $212,000 out of the original issue of $300,000 of bonds, and more than $100,000 of accrued interest between 1870 and 1879 (pp. 35–56).

THIRD.—They appointed representatives of the County to cast the vote of the County at the annual elections of the stockholders for directors, held in the years 1870, 1871, and 1872 (pp. 35, 39, 42).

On January, 27, 1870, by an Act entitled "*An Act to repeal all laws establishing Boards of County Commission-*

ers" (See Acts of 1869–70, page 119), the Legislature repealed all Acts establishing County Commissioners, in Tennessee, and revived all laws or parts of laws which were repealed by any Act or Acts establishing such County Commissioners.

On February 22, 1871, the Supreme Court of Tennessee, in the case of *Pope* vs. *Phifer*, 3 Heisk, 682, decided that the Act of March 12, 1868, chapter 65, by which County Commissioners had been created for the Counties of Madison and White, and which Act was in all respects identical with Section 25 of the Act of March 9, 1867, establishing such Commissioners for the County of Shelby, was unconstitutional and void, *so far as it invaded and trespassed upon the functions of the Justices of the Peace who were, by the Constitution, entitled to hold the Quarterly Court of the County as a judicial and legislative body.*

This decision was made in an action brought by the Justices composing the Quorum Court of the County of White and by certain other citizens of that County, for the purpose of restraining the Commissioners of the County from entering upon the duties imposed upon them in respect to administering and exercising the powers of the County Court, and the whole tenor of the decision is, that as the County Court, composed of the Justices of the Peace, was the constitutional, judicial and legislative tribunal of the County, created and recognized by the Constitution of 1834, it was not within the constitutional power of the Legislature to supplant it, or to transfer its functions from the Justices of the Peace to Commissioners, in derogation of the established order of things created by the Constitution. But the question whether the *specific* powers conferred by the Act, in express terms, upon the Commissioners, *and in* ADDITION *to those powers which were constitutionally inherent in the County Court*, might be within the power of the Legislature to confer upon them, was not and could not be raised or considered in the case; nor was there any occasion for the Court to pass upon the further question now raised in this action, as to the effect upon the public and third parties of the acts of the Commissioners during the two years and a half in which they exclusively exercised the powers of the County Court.

On June 1, 1871, the Supreme Court of the State, upon the strength of the decision in *Pope* vs. *Phifer*, rendered a final decision in the case of *Walker* vs. *Merriman*, already referred to, which had been brought by the Justices of the County Court to oust the Commissioners of Shelby County (pp. 87–88).

It will be observed that the Act creating the Commissioners having been repealed a year and a half before (and, indeed, more than a year before the decision in *Pope* vs. *Phifer*), there was no footing for a decree in either case and nothing for the Court to pass upon. Nevertheless, a formal decree was entered, declaring the opinion of the Court to be that at the time of the filing of the bill the complainants were entitled to the relief prayed for, and that the decree below dismissing the bill was erroneous.

And the formal decree so entered by the Supreme Court on June 1, 1871, concludes as follows (p. 87):

> "But, it appearing that the Act under which the bill alleges "the defendants usurped office has, since the filing of the bill, "been repealed, and that the defendants have not, since the re- "peal thereof (January 27, 1870), assumed to exercise the "powers and perform the duties in said Act named, and are "not now doing so, the Court is of opinion that it is only neces- "sary, under these facts, in addition to what is decreed above, "to dispose of the costs of the cause, which is done by taxing "them against the defendants, and awarding execution there- "for."

The decision proceeds wholly upon the strength of *Pope* vs. *Phifer*, in which there was at best only a formal declaration of the right of the plaintiffs as Justices of the Peace to have held the Quarterly Court of the County instead of the Commissioners, from the beginning. The Supreme Court itself subsequently declared in the case of *McLean et als.* vs. *The State of Tenn. and Shelby County*, 8 Heisk., at page 237, decided in October, 1873,

> "That the law creating the Board of County Commissioners, "*so far, at least*, as it authorized said Board to usurp the *con-* "*stitutional functions* of the County Court, was in violation of "the Constitution, and their acts without authority of law."

which could only have referred to the decision in *Pope* vs. *Phifer*.

At the same term of the Court (April, 1871) at which *Pope* vs. *Phifer* was decided, came the decision in the case of *Shelby County* vs. *Butterworth*, the opinion in which case will be found attached to the Brief filed herein on behalf of the Defendant in Error, by Mr. Glisson.

Butterworth had purchased certain tax warrants signed by the Commissioners during their tenure of office, and had procured judgment on them by default against the county, which judgment was reversed on appeal by the Supreme Court, as a supposed direct consequence of the decision in *Pope* vs. *Phifer* and *Walker* vs. *Merriman*, the conclusion of the Court being that as the Act had been declared to be unconstitutional, it was "inoperative as to the existing organization, powers and duties of the County Court," and conferred no judicial power upon the Commissioners, and that the County Court, through its Judges, was the only legal authority by which such warrants could be issued. "The first element," as the Court say, "to give the warrants validity was wanting, viz., authority in the Board of Commissioners or its President to issue them."

The issuing of the tax warrants was an exercise of the *taxing* power of the County which had been held in *Pope* vs. *Phifer* to reside in the Justices of the Peace of the County holding the Quarterly Court of the County, as the County Legislature, and as inherent in them under the Constitution of 1834. But there was no allusion in this case, nor in either of the prior cases on which it rested, to the question presented by the record here, as to the validity of the Act creating the Commissioners, *so far as it conferred by express provision powers upon them which were not constitutionally inherent in the County Court, and which were not involved in or a part of the taxing power.* Nor was there any adjudication as to the effect of such acts by the Commissioners during their tenure of office.

The County Court, though still holding the stock and voting upon it by their appointed agents (Record, p. 39), rejected, at the meeting of April 11th, 1871, the annual report of the committee which had recommended the assessment of the usual tax to pay the Mississippi River Railroad Bond Tax (p. 38). But on the following day, April 12th, 1871, on the application of the President and Secretary of the

Railroad Company, this action was reconsidered and rescinded, and the usual tax was assessed to pay the interest on the bonds, with this proviso (p. 39):

> "But the same shall not be a waiver of the right of this Court
> " to order the money collected on said assessment to be withheld
> " at any time when it may appear to the Court that the officers
> " of the road are misappropriating funds or failing to prosecute
> " the work on the road with due diligence."

Again, on July 7th, 1871, the County Court reciting the decisions above referred to, as to the unconstitutionality of the Act creating the Commissioners, reconsidered and revoked their order of April 12th, and specially ordered the tax collector of Shelby County to fail and refuse to collect the tax assessed (pp. 39–40).

In this situation of affairs the session of the Court was held on October 5th, 1871, at which the transactions occurred which are claimed by the plaintiff to be an absolute ratification on the part of the County of the bonds in suit, and a complete *estoppel* as against the County to question their validity—in substance, an express and valid agreement by the County for good consideration, that if the Paducah and Memphis Railroad Company would consolidate with the Mississippi River Railroad Company, and apply its great resources to the building of the Road within the County, the County, as the holder of three thousand shares of stock in the latter Company—which had become unable to prosecute the work—would come into the arrangement, exchange its shares for an equal amount of the stock of the Consolidated Company, and as a part of the arrangement, and as an inducement to, and by way of consideration for the Paducah Company to enter into it, the County would recognize and waive any defense to the bonds which, by the arrangement, would pass to the Consolidated Company.

The order of the July Term suspending the collection of the tax levied to pay the subscription to the capital stock of the Railway Company was rescinded, and the tax collector instructed to proceed with the collection of the tax of fifteen cents on the hundred dollars already assessed (p. 41); and the following express ratification of the acts of

the Commissioners during their tenure of office in respect to taxation, treating them as acts done on the part of the *County* by improper agents, was formally entered on the records (p. 41):

> "Whereas, the assessments for State and County taxes made "by the late so-called County Commissioners of Shelby "County for the years 1867, 1868 and 1869, were made for "taxation authorized by law, but not by the County Court, "the only agents of the County and State authorized to "make such assessments; and whereas said assessments are "invalid, without the approval of this Court; and whereas a "large majority of the taxpayers have paid the taxes thus as- "sessed, and it would be unjust to allow the delinquent tax- "payers to escape this burden that prompt payers have long "since settled:
>
> "*It is therefore ordered by this Court: That the rate of taxation* "*fixed by said Commissioners for said years of* 1867, 1868, "1869, *for State and County purposes in the County of Shelby,* "*State of Tennessee, and the valuation and assessments of realty* "*in said County, as shown by the tax books of said County Com-* "*missioners for said years, be adopted by this Court as fully as* "*if this Court had made and fixed them in the first instance.*"

What took place between the Court and the Paducah and Memphis Railroad Company, represented by the plaintiff as its President, on that occasion, is established by the oral evidence (pp. 71–78), by which it appears that the plaintiff was the President of the *Paducah and Memphis Railroad Company*, with which Company it was then proposed, and under consideration, to consolidate the *Mississippi River Railroad Company*, to which latter Company the bonds in suit had been issued, and by which Company said bonds were then held as payment for stock of the Company subscribed for and held by the County.

The *Paducah Railroad* was then completely built and equipped and in running order from Paducah to Troy Station, a distance of 63 miles, in active operation and out of debt, and was of the value of a million dollars (p. 73).

At the same time the *Mississippi River Railroad Company* had done but little work on its line, none of which was complete. Less than $150,000 had been expended in the work, and the only assets of any amount, or of any real value, which it had, were the bonds which it had taken in

payment of subscriptions for stock by Counties, and among these about 250 of the bonds of Shelby County, including those in suit (p. 74), and the object of the plaintiff, on the part of the *Paducah Company*, in going before the County Court, was to make sure that these Shelby County bonds, which were to be a part of the property of the new corporation if the consolidation was effected, were of value, and would be paid as they matured. And he also wanted to have the *County* fully understand the plan of consolidation which had been proposed (p. 73).

The plaintiff at the time referred to, besides being the President of the *Paducah Company*, was the owner of four-tenths of all its stock, and his brothers owned three-tenths more (p. 72).

He stated to the Court the facts as to the pending proposals for the consolidation of the two Railroad Companies, setting forth their respective properties, franchises and assets, his own interest in the stock and assets of the *Paducah Company*, the actual condition and value of that Railroad, and its property, and expressly stating that before he would put his own property and the property of others into such consolidation with the *Mississippi Company* he wanted to know definitely what Shelby County would do as to the bonds issued by it to the *Mississippi Company*, as those bonds constituted a large part of the assets of that Company; that if there was any doubt about the County paying such bonds, he wanted to know it, for in that event he would oppose the proposed consolidation; that he did not intend to put the *Paducah Company* into the consolidation unless the bonds were to be paid; and that as he was the owner of four-tenths of all its capital stock, the consolidation would not be made without his consent (pp. 71–76).

There was some discussion between the members of the Court, and before the plaintiff left the court room, the Court, by a vote of 23 yeas to 7 noes, adopted the order levying the tax to meet the next maturing installments of these bonds and the accruing interest, and the plaintiff was assured by many members of the Court that the whole would be paid (p. 41).

In reliance upon this action and the assurances thus given, the proposed consolidation took place (pp. 74, 76.)

At a subsequent meeting of the stockholders of the *Paducah Company*, the plaintiff, as its President, reported to the stockholders what had occurred at his meeting with the County Court, and the stockholders approved the plan of consolidation. The County, under the orders of the County Court, voted its entire block of $300,000 of stock of the Mississippi River Railroad Company in favor of the consolidation (p. 74).

The County therefore reaped the full fruits of the consolidation. It surrendered its certificate of stock in the *Mississippi Company* to the new corporation, receiving in exchange therefor the same amount of stock of the Consolidated Company (p. 75). It afterwards voted as a stockholder in that Company, and retained its stock therein without any offer to surrender the same, and is still the owner thereof. It was after this, and before the maturity of the bonds in suit, that they were purchased by the plaintiff from the Consolidated Company (p. 75).

The Consolidated Company proceeded in good faith to expend its moneys upon the Road in Shelby County, and completed it from Troy Station to Memphis at an expense, *within the County*, of $400,000, all which was done in July, 1873, and the Road has been in full operation ever since (p. 75).

The action of the County Court from 1872 to 1882 shows that they, as well as the plaintiff, relied upon the consolidation as having been entered into in good faith on both sides. (See Record, pp. 50–70.)

The County stock was surrendered and the new certificate taken. Annually, as installments of the bonds matured and the interest accrued, the tax was raised and applied to their payment, and when all the principal except the $88,000 of bonds belonging to the plaintiff had been paid and satisfied, the question of the validity of the bonds was insisted upon and culminated in the present suit.

In connection with the facts hereinbefore stated, upon which the plaintiff relies, as working a complete *estoppel* against the County to question the validity of the bonds in suit, the following Sections of the Code of Tennessee, adopted in 1858, and in force at the time, are here referred to, as showing the power and authority of the County

Court to make the arrangement it did in 1871, with reference to the consolidation of the two Railroad Companies:

> "§ 402. Every County is a corporation, and the Justices in "the County Court assembled *are the representatives of the* "*County and authorized to act for it.*"
>
> "§ 404. Each County may acquire and hold *property for* "*County purposes, and make all contracts necessary or ex-* "*pedient for the management, control and improvement* "*thereof*, and for the better exercise of its civil and political "powers may make any order for the disposition of its prop- "erty, and may do such other acts and exercise such other "powers as may be allowed by law."

The Court below, upon these facts, ordered a verdict for the County, and from the judgment entered on such verdict this writ of error is taken.

First Point.—*That provision of the 25th Section of the Act of March 9, 1867, creating the County Commissioners of Shelby County, by which, in* ADDITION *to vesting in them the powers and duties vested in the Quarterly Court of the County, they were expressly and specifically authorized, among other things, "to subscribe stock in "railroads, which the County Court of Shelby County "has been authorized by general and special law to sub- "scribe, and under the same conditions and restrictions, "and to represent such stock in all elections of directors, "and provide for payment of subscriptions as made," was constitutional and valid, even though in deference to the subsequent decision of the Supreme Court of Tennessee, the first clause of the Section should be condemned as unconstitutional and void. And the proposition here stated has not been passed upon or considered by any Court of that State, but is an original question to be determined here and now.*

(*a.*) The well settled rule is that although parts of an Act, or, indeed, most of the provisions of it, be uncon-

stitutional, because beyond the scope of legislative power to enact, yet that other provisions in the same Act, which are clearly within the power of the Legislature to enact, and are severable from the rest, may and must be saved from the judicial condemnation. In fact, the judicial power extends so far only as to declare void the part where the fault is. It must preserve the rest. If the good part is inseparably involved with the bad, so that it cannot be dissected, the whole must be cut off together. The wheat in that case must be burned with the tares. But if the Legislature has enacted a provision which was clearly within the legislative power, the fact that in the same Act, or Section, it has inserted separate and distinct provisions which it had no right to make law, does not justify the judicial department to declare the whole void.

The question is, *Are they separable?* That is the crucial test. If they are, the good part must stand.

If they are separable, so that, striking out the unconstitutional provision, the rest can stand as a complete and independent enactment, it is not for the Court to indulge in speculation or conjecture as to what the Legislature might or might not have been inclined to do, if it had been proposed to pass the Act, or Section, as so modified. A resort to that sort of inquiry has sometimes been spoken of as a possible test. But surely what rests only in speculation and conjecture cannot be a test. Nor is there any legal standard by which a Court can ever determine what so loose and irresponsible a body as a legislature might, under other circumstances, have done. The question must always be determined by what it *has* done. If out of the Act, or Section, as passed, a provision found by the Court to be unconstitutional can be cut, and the rest stand alone, it is not within the power of the judicial department to interfere with or annul that.

Especially is it incumbent upon the courts not to condemn a part of a law which, taken by itself, is free from constitutional objection, while condemning the rest of the Act, in a case where in reliance upon the enact-

ment of that part, rights have vested, contracts have been entered into, and value has been parted with, at a time when as yet no question as to the constitutionality of any part of the Act had been raised, and, above all, where negotiable securities have been issued and taken in honest reliance upon the validity of the Act.

See *Cooley on Const. Limit.*, "Statutes Unconstitutional in part," pp. 211–216, and cases there cited.

(*b.*) We need not go outside of the decisions of this Court for ample illustrations of this doctrine.

In *Bank of Hamilton* vs. *Dudley's lessee*, 2 Peters, 526, MARSHALL, *C. J.*, says:

> "If *any part* of the Act be unconstitutional, the provisions "of that part may be disregarded, while *full effect will be given* "*to such as are not repugnant* to the Constitution of the "United States or of the State."

In *Packet Co.* vs. *Keokuk*, 95 U. S., 89, STRONG, *J.*, says:

> "Statutes that are constitutional in part only will be up- "held so far as they are not in conflict with the Constitution, "*provided the allowed and prohibited parts are severable.* We "think *a severance is possible* in this case. It may be con- "ceded the ordinance is too broad, and that some of its "provisions are unwarranted. When those provisions are "attempted to be enforced a different question may be "presented."

Again, in *Allen* vs. *Louisiana*, 103 U. S., 80, WAITE, *C. J.*, says:

> "It is an elementary principle that the same statute may "be in part constitutional and in part unconstitutional, and "that if the parts are wholly independent of each other, that "which is constitutional may stand, while that which is "unconstitutional will be rejected. The point to be de- "termined in all such cases is whether the unconstitutional "provisions are so connected with the general scope of the "law as to *make it impossible*, if they are stricken out, to "give effect to what appears to have been the intent of the "Legislature."

The decision in *Poindexter* vs. *Greenhow*, 114 U. S., 271, aptly illustrates the rule. The Acts of Virginia complained of were held to be unconstitutional and void, because they constituted in the whole and in all their parts a general scheme to impair the obligation of the previous contract of the State with the coupon holder; and that being the object of the Acts, the vice that invalidated them was held to pervade them throughout, and in all their provisions. And when the attempt was made to uphold those parts of the Acts which repealed and abolished all actions as remedies for the coupon holder, except the personal action against the collector, it was overruled by the Court, because *it was not practicable to separate* those parts from the main objects of the Acts which those particular parts were, indeed, intended to effectuate. It was not one of those cases "*where the parts are so distinctly separable that each can stand alone*" * * * * * (p. 305).

In the recent case of *Presser* vs. *Illinois*, 116 U. S., 252, where the plaintiff in error had been indicted and convicted for a violation of certain sections of the Military Code of the State of Illinois, the doctrine is reasserted by this Court, that statutes, constitutional in part only, will be upheld as to what is constitutional, if it can be separated from the unconstitutional provisions.

And WOODS, *J.*, delivering the opinion of the Court, says, at p. 263:

> "We have not found it necessary to consider or decide the "question thus raised, as to the validity of the *entire* Military "Code of Illinois, for, in our opinion, the sections under "which the plaintiff in error was convicted may be valid, "even if the other sections of the Act were invalid. For it is "a settled rule 'that statutes that are constitutional in part "only will be upheld so far as they are not in conflict with "the constitution, *provided the allowed and prohibited parts "are separable.*'"

In *People ex rel. City of Rochester* vs. *Briggs*, 50 N. Y., 553, the Court say, at pp. 565-566:

> "It is a universal rule that where a part of a statute is unconstitutional, that fact does not authorize the Courts to declare the remainder void, *unless the provisions are so connected together in subject matter, meaning or purpose*, that it cannot be presumed the Legislature would have passed the one without the other."

And as further showing that the constitutional and unconstitutional provisions may be contained in the same section, and may even be embraced in the *same general language*, we call the special attention of the Court to the case of *The Mayor and Council of Hagerstown* vs. *Daniel Dechert*, 32 Md., 369—*a case very similar to the case at bar.*

There, the Act of Incorporation of Hagerstown, passed in 1847, provided that

> "The Mayor, in virtue of his office, shall have and exercise "*all the jurisdiction and powers of a Justice of the Peace*, and "shall be entitled to the same fee."

This Act was subsequently re-enacted in the Code in 1860. But meanwhile, to wit, in 1851, a new Constitution was adopted, and by Article 4 thereof the officers were defined in whom the judicial power of the State was thereafter to be vested, among whom the Mayor was not included.

The question before the Court was whether the Constitution of 1851, which clearly stripped the Mayor of the judicial power or jurisdiction appertaining to the office of a Justice of the Peace, did not further deprive him of his police powers as a conservator of the peace, which it was entirely competent for the Legislature to confer on him, such powers, however, being also possessed by Justices of the Peace?

The Court held that the Mayor retained his police powers, and that to that extent the Act of 1860, re-enacting the original Act of Incorporation of 1847, was constitutional and valid; that the constitutional and unconstitutional provisions might be contained in

the same section, and yet be perfectly distinct and separable, so that the first may stand, though the last fall; *and that the question to be decided is whether they are essentially and inseparably connected in substance.*

And the Court say, at pp. 383-384, after calling attention to the fact that no judicial powers could be conferred on the Mayor after the new Constitution was passed:

> "But it by no means follows that the 137th section of the "Code was altogether inoperative and void. That section "did not attempt to make the Mayor a Justice of the Peace, "but to confer upon him certain powers as Mayor. It in "terms gave him as Mayor '*all the jurisdiction and powers of* "*a Justice of the Peace.*' Now, some of the powers exercised "by a Justice of the Peace are judicial; he has jurisdiction to "hear and decide cases, civil and criminal. *So far as such* "*jurisdiction is concerned,* the 137th section of the Code is "inoperative. *But in addition to the judicial functions of a* "*Justice of the Peace,* he has important police powers as a "conservator of the peace, not in any respect judicial in their "nature, and which it was entirely competent for the Legis-"lature to confer upon the Mayor of Hagerstown * * * "Such powers, in our opinion, were conferred on the Mayor "by section 137, Article 21 of the Code. To *that* extent, it is "constitutional and valid, while it is inoperative only so far "as it might be construed as vesting in him judicial power. "A statute may be good in part while other parts are invalid. "If a portion be unconstitutional, the Court is not author-"ized for that reason to declare the whole void.
>
> "In *Commonwealth* vs. *Hitchings*, 5 Gray, 482, where the same "rule of construction was adopted, the Court said: 'The "constitutional and the unconstitutional provision may even "be contained in the same section and yet be perfectly dis-"tinct and separable, so that the first may stand, though the "last fall. The point is, not whether they are contained in "the same section, for the distribution into sections is purely "artificial; *but whether they are essentially and inseparably* "*connected in substance.*'"

(*c.*) Viewed in the light of these principles, the provisions of the 25th Section of the Act of March 9, 1867, by which, after completely vesting in the Board of Commissioners the entire powers which inhered in the

County Court, it proceeded to confer upon the Commissioners, "*in addition*," certain express powers, which were not, *by the Constitution*, vested in that Court, powers neither judicial nor legislative in their character, but purely administrative, respecting the business affairs of the County, and among the rest "*to subscribe stock in railroads*," *&c.*, may well be sustained as constitutional, although the first clause of the Section (25), which attempts to substitute the Commissioners in the place of the Justices of the Peace as Judges of the County Court, be condemned.

These additional provisions are neither conditional nor dependent upon the first clause, nor is the first clause conditional or dependent upon them.

Strike out the first clause of the Section which vests in the Board the powers and functions of the County Court, and you have a complete and perfect statute without it—a statute clearly within the power of the Legislature to enact. The additional provisions *are severable* from the void part.

It is "*practicable to separate those parts*" from the first and perhaps main object of the Section. They are "*so distinctly separable that each can stand alone.*" It is "*possible to strike out the void part, and to give effect to what appears to have been the intent of the Legislature,*" in what remains as a complete and independent Act. Or, in the language of CHIEF JUSTICE MARSHALL: "*The unconstitutional parts may be disregarded,*" and yet "*full effect given to those that are not repugnant to the Constitution of the State.*"

It will not be contended that the Legislature might not have created a Board of County Commissioners and conferred upon them these additional powers alone; or that it could not originally have conferred the right to subscribe for the stock of railroads upon the *County* by vesting the exercise of it in such a Board; and if it could do that, then clearly having once directed it to be exercised by the Justices composing the County Court, it could well by a subsequent Act substitute a new agent for the County to

exercise the power in its behalf, and that is in substance what the 25th Section of this Act does.

Where, as in this case, the good parts of the Act are clearly separable from and independent of the parts which are repugnant to the Constitution, we submit that it is not within the province of the Court to speculate upon the question whether the Legislature, if they had not entertained the purpose of transferring the inherent functions of the County Court to the Commissioners, and attempted to do so by the first clause, would have been inclined to enact the 25th Section without that clause.

But even if that speculation be pursued in this case, there is nothing on which to base the conclusion that the Legislature would not have done so. There is nothing in the "*additional powers*" conferred upon the Board peculiarly appropriate to the County Court as the medium of their exercise, and which might not be as well and better performed by a Board of Commissioners of limited numbers. And when the rights of third parties have intervened, and vested rights have been acquired in reliance upon the enactment, it is sufficient that the Legislature have so enacted, and that their action to that extent was not repugnant to the Constitution.

It will be observed also that by a previous Section of the Act, in contemplation of possible attempts to declare part of the Act unconstitutional, an express prohibition to lending support to such attempts by injunction was inserted in the Act (Sec. 17), and it may well have been the intent of the Legislature in adding to the first clause of Section 25 an express gift to the Commissioners of the special powers enumerated, in *addition* to the powers vested in the County Courts, that, though the first clause should fail for unconstitutionality, the gift of the *additional* powers should still be preserved. They were all substantially powers which by previous general or special laws had already been conferred on the County Courts, but none of them were among the powers or duties which were *Constitutionally* inherent in the County Courts.

The fact that the good and alleged bad parts of the Act in question appear in the same Section is of no importance. As *Cooley* says in his *Constitutional Limitations* (5th ed.) at p. 212:

> "The constitutional and unconstitutional provisions may "even be contained in the same section and yet be perfectly "distinct and separable, so that the first may stand though "the last fall. The point is not whether they are con- "tained in the same sections, for the distribution into sec- "tions is purely artificial, but whether they are *essentially* "*and inseparably connected in substance.* If, when the un- "constitutional portion is stricken out, that which remains "is complete in itself, and capable of being executed in ac- "cordance with the *apparent* legislative intent, wholly in- "dependent of that which was rejected, it must be sus- "tained."

The Court also will not fail to observe that here is an Act of more than 40 Sections, making a radical change in the affairs of the County, and only the first clause of Section 25 has been challenged. Outside of the Sections providing for the constitution of the Board of County Commissioners, all the rest of the Act stands as unquestioned law.

(*d.*) The decisions of the Supreme Court of Tennessee, relied upon by the Defendant in Error as declaring the 25th Section of the Act of March 9, 1867, to be unconstitutional and void, do not touch the question of the validity of those parts of the Section substituting the Board of Commissioners as the designated agents of the County to subscribe for stock in railroads and issue bonds for the same.

The case of *Pope* vs. *Phifer*, 3 Heisk, 682, is first to be considered.

The Act of March 12, 1868, entitled "*An Act to create a Board of Commissioners for the County of Madison,*" the provisions of which were extended by its 15th Section to the County of White, was, in substance, identical in its provisions creating such Board with those of the Act of March 9, 1867, for the County of Shelby. Its 5th Section, declaring the

powers of the Board, was exactly identical with the 25th Section of the latter Act (Acts of Tenn., 1867–8, Chap. 65, p. 80).

By the 19th Section, the Quorum Courts of the Counties to which the Act related are abolished, and all their powers and jurisdiction are vested in the Board of Commissioners.

Immediately after the passage of this Act, the Justices composing the Quorum Court of White County and certain other citizens of that County filed their bill in the Chancery Court to restrain, by injunction, the defendants from organizing as the Board of Commissioners of the County of White, and to have the Act creating the Board declared unconstitutional. The Chancellor, by his decree, found the Act to be constitutional and dismissed the bill, and the complainants appealed to the Supreme Court. Pending this appeal, the Legislature, by the Act of January, 1870, repealed the Act and revived all Acts which had been repealed by it. So that when the appeal came on to be heard there was nothing for the Appellate Court to act upon except a possible question of costs. Nevertheless, the Supreme Court heard the appeal and concluded their elaborate opinion thus :

> " The decree of the Chancellor is reversed, the injunction " granted made perpetual, and the defendants will pay the " costs."

Thus it is apparent that there was really no question before the Court, nobody to be enjoined, and nothing to restrain, against which an injunction could run. The decree perpetuating the injunction was *brutum fulmen*, and while the opinion of the Court is entitled to consideration as an exposition of the Constitution of Tennessee by the learned Judges composing the Court, it can go no further than an authoritative opinion upon the questions discussed by them, among which the question now presented was not considered, or in the remotest way referred to.

The Court treats of two questions only:

First, whether the Legislature had the constitutional power

> *"To supplant and abolish that ancient institution of the State "known as the Quarterly Court, and place in its stead a "Board of three Commissioners appointed by the Governor, "conferring upon the Commissioners the powers of the "Quarterly Courts, together with some additional powers, per- "haps, not possessed by said Court under the laws in existence "at the time of the passage of this Act by the Legislature."*

Although the *additional* powers granted by the Act are thus incidentally referred to at the outset of the opinion, no subsequent reference is made to them, and the whole opinion will be found to turn upon the question of the power of the Legislature to reorganize the County Court by transferring its powers, functions and duties from the elected Justices of the Peace of the County, to whom they were secured by the Constitution, to a Board of Commissioners to be appointed by the Governor.

The *Second* question considered is whether, if the Legislature could do this, it could do it in the mode attempted—that is, by an Act applicable only to one or two counties, a partial or exceptional piece of legislation?

The Court, on the *First* question, holds that the County Court or Quarterly Court was part and parcel of the organized machinery of the State Government at the adoption of the Constitution of 1834, and had been of the State of Carolina before the organization of the State of Tennessee and the adoption of the Constitution of 1796; that it was expressly recognized and continued by the Constitution of 1796; that although not expressly mentioned in the Constitution of 1834, it was intended to be recognized and continued by that organic instrument; that as so recognized and continued, it consisted only of the Justices of the Peace of the County, elected by the people; and that contemporary construction by the Legislature and the

people confirmed this view of the construction of the Constitution of 1834.

As the Court say at page 691 of the Report:

> "From this view of the case we are led to the conclusion "that the Constitution looked to the continued existence of "*this assemblage of the Justices of the Peace of the County* "for the performance of the duties therein imposed, and "that it was recognized as an assemblage representing the "corporate existence of that constitutional division of our State "known as a county; and that this institution, in this aspect "of it, must continue until abrogated by the action of the "people in changing the constitutional provisions referred "to."

The Court further holds that the other provision of the Constitution, giving the Legislature power (Art. 2, Sec. 29) to authorize counties to impose taxes for county purposes, involved the idea "*of a county as a corporate body*," and, as such, being represented by the County Court, in which the taxing power so to be authorized was intended by the Constitution to be vested.

Thus having found the inherent judicial powers vested by the Constitution in the Justices of the Peace assembled as the County Court, as the judicial organism of the County, and the taxing power vested therein as the constitutional legislature of the County, it holds that no Legislature of Tennessee, or any body short of a Constitutional Convention can change, or amend, or abolish this established order of things. Beyond this, however, so far as concerns the *first* question considered, the Court does not profess to go. For, as they say in their opinion at p. 694:

> "We mean * * * to confine this opinion to the simple "question of the power of the Legislature to overturn the "local government, so to speak, of a county, displace the "assemblage of the recognized organization of the county, "*to whom duties are assigned by the Constitution*, and place in "its stead other organizations unknown to our past his- "tory up to the passage of the law of which the Act of 1868 "is a part, and never contemplated by the Constitution, nor "purposed or provided for in that instrument."

On the *Second* question, the Court holds the first clause of Section 25, if it had been otherwise constitutional, to be repugnant to the express prohibition of the Constitution against partial legislation, limited to one or more counties, and departing from the general "law of the land," and this chiefly on the ground that taxation and representation should go together, and that as the taxing power was vested by the Constitution under delegation from the Legislature in the County Court, a body of representatives chosen by the people, it could not have been intended to permit the Legislature, by a special enactment limited to a few Counties, to change this ancient system.

This, then, is the full extent of the opinion in *Pope* vs. *Phifer*, and it must be obvious that the question of the power of the Legislature when giving power to a County to subscribe for the stock of a Railroad and issue bonds therefor, to designate an agent other than the County Court by whom should be exercised this new power, which could not exist without express grant from the Legislature, was not even touched upon. It certainly was not a power inherent in the County Court at the time of the Constitution, whether regarded as a judicial or legislative body. It was not a power involved in the taxing power, though when it was once conferred and exercised, the taxing power of the County would be brought into play to raise the means of paying the bonds. It is a special matter of legislative creation, wholly independent of the power of taxation, and the Legislature, in creating the power in the County, may provide by what particular agent, or in what particular manner it shall be exercised.

The case of *Walker* vs *Merriman*, decided by the Supreme Court of Tennessee at April Term, 1871, three months after *Pope* vs. *Phifer*, was simply a decree entered in pursuance of that decision. As in that case, the bill was filed immediately after the passage of the Act of March 9, 1867, by the Justices of the Peace of Shelby County to enjoin the Commissioners appointed by the Governor from exercising the consti-

tutional functions of the County Court, after they had begun to do so. The Chancellor upheld the Commissioners and decided against the complainants. And as in the former case, more than a year after the Legislature had repealed the Act creating the Commissioners, a formal decree was entered, reversing the decree of the Chancellor.

The Supreme Court of Tennessee itself in a subsequent case declared exactly what was decided in *Pope* vs. *Phifer* and *Walker* vs. *Merriman*, thus :

> "That the law creating the Board of County Commissioners "*so far at least* as it authorized said Board to usurp the *con-* "*stitutional* functions of the County Court, was in violation "of the Constitution, and their acts without authority of "law, is a proposition not denied."
>
> *McLean* vs. *Tennessee and County of Shelby*, 8 Heiskell, p. 237.

The power to subscribe for the stock of a Railroad and to issue bonds therefor was certainly not one of the constitutional functions of the County Court.

The case of *Shelby County* vs. *Butterworth* (printed as an appendix to Mr. Glisson's Brief), decides nothing more than the two cases already discussed, and is in fact a mere sequel to them. It comes no nearer than they do to concluding the rights of the plaintiff in error. The President of the Board of Commissioners holding a session of the County Court, had issued a number of warrants on the County Treasury for County debts, which had been bought by *Butterworth*, who had sued the County upon them and got judgment by default. The County appealed, and after the judgment in *Pope* vs. *Phifer*, the Supreme Court reversed the decision upon the ground, that as that case had decided that the exercise of the power of taxation was one of the constitutional functions of the County Court, which could not be vested by the Legislature in another tribunal, the decision therein was conclusive against *Butterworth*.

(*e.*) That the power to subscribe for stock of a Railroad and to issue bonds therefor is a distinct and different power from the power of taxation, although after its exercise the power of taxation which resides in the County must also be exercised to provide for the payment of the bonds; and that it depends wholly on special legislative grant to the County, and that the Legislature may prescribe the mode of its exercise, and the agents by whom it may be exercised, are propositions habitually recognized in the decisions of this Court.

In *Police Jury* vs. *Britton*, 15 Wallace, 566, it was held that "The trustees or representative officers of a county, or other local jurisdiction, invested with the usual powers of administration in specific matters, *and the power of levying taxes to defray the necessary expenditures* of the jurisdiction, have no implied authority to issue negotiable securities payable in future, of such a character as to be unimpeachable in the hands of *bona fide* holders, for the purpose of raising money or funding a previous debt."

In *Claiborne County* vs. *Brooks*, 111 U. S., at pp. 406–407, the Court say:

> "Our opinion is that mere political bodies constituted as "counties are, for the purpose of local police and administration, *and having the power of levying taxes to defray all "public charges created*, whether they are, or are not, formally "invested with corporate capacity, have no power or authority "to make and utter commercial paper of any kind, unless "such power is *expressly* conferred upon them by law, or "clearly implied from some other power expressly given, "which cannot be fairly exercised without it."

In *United States* vs. *New Orleans*, 98 U. S., 381, this Court discussed and distinguished the power to subscribe for stock of a Railroad, and issue bonds therefor, from the power of taxation, holding that the latter power is vested in municipal corporations when they are created, as an essential attribute of all the purposes of their existence, unless its exercise be in

express terms prohibited; that for whatever debts are incurred by them by lawful authority, they have the inherent power to raise taxes to meet the obligation, but that, at the same time, the power to subscribe for stock of a Railroad and issue bonds therefor is a distinct power, resting upon *express* legislative grant, and measured as to the mode and extent of its exercise by the mandate of the Legislature.

(*f.*) There is nothing in the Constitution of Tennessee which expressly, or by implication, restricts or impairs the power of the Legislature to designate *any agent it may select* to make a subscription and issue bonds on behalf of a County or other municipal corporation.

The whole subject of the power of the State in the administration of the affairs of such municipal bodies, as portions of the governmental power, when not restrained by express constitutional limitations, is disposed of by this Court in *United States* vs. *Balt. and O. R. R. Co.*, 17 Wallace, 322, where it became necessary for the Court to consider and analyze their nature and their relation to the governing power. And it was there held that such municipal bodies are the mere creatures of the State, made for specific purposes to exercise within a limited sphere the powers of the State, and that the State may, through its Legislature or other appointed channels, govern the local territory as it governs the State at large, and may enlarge or contract its powers, or even destroy its existence; and that the power to subscribe for stock in a Railroad and issue bonds therefor may even be imposed by the State upon the County without the consent, or even against the express will of its inhabitants, and that the State could even make the subscription directly for and on behalf of the County by its own appointed agents, and without any intervention on the part of the County. In short, it was held that in the whole matter the Legislature, as representing the State, is supreme, except as limited by constitutional restriction.

The Courts of Tennessee are equally explicit on this point.

In *L. & N. R. R. Co.* vs. *County Court*, 1 Sneed, 637, the Court say, at p. 677:

> "This act provides for the creation of a county debt for "stock in a road, and a tax to meet it. * * * The Legis- "lature, it is admitted, could do this, or it could empower "the Court or a corporation to do it, but cannot leave it to "the people! What says the Constitution? * * * How "shall this power be exercised? By what agent or instru- "mentality? by the County Courts or Circuit Courts, or by "representatives from each civil district selected for that "purpose, in convention, or by the people? No. *The mode "of doing it is left to the General Assembly.* The authority is "to be exercised *by the 'Counties in such manner as shall be "prescribed by law.'* The Legislature then have, by the "Constitution, the unequivocal power to determine and "direct how and in what manner these taxes may be imposed "by the counties upon themselves, as well as to what extent "and for what purpose. *That the County Court may have "been empowered to act for the county on this subject is no "objection to the different mode or agency adopted by this act.* "It may certainly be said, with great safety, that as *the "Legislature was expressly entrusted with the selection of the "mode and manner of imposing the debt, and the tax on the "county,*" &c.

We, therefore, confidently submit that the Legislature of Tennessee might have originally vested the power to subscribe for the Railroad stock and issue the bonds therefor on the part of the County in Commissioners designated by it for the purpose, and after first designating as such agents the Justices of the Peace composing the County Court, it could by a subsequent Act transfer that agency to the Commissioners; that by the 25th Section of the Act of March 9, 1867, it did so transfer the agency; that this intent in the enactment was manifestly distinct from, independent of and additional to the intent to vest in the Commissioners the inherent powers of the County Court which were secured to it by the Constitution; and that although the latter intent may have been beyond the Legislature's power, and so the enactment to that ex-

tent may be declared unconstitutional; yet, as it is not merely possible, but entirely practicable, to separate the two provisions so that each can stand alone, the Court will not and, indeed, for want of power, cannot, involve the separate sound enactment in the condemnation of the unsound, which is embraced in the same section, especially where vested rights have accrued upon the faith of the constitutional provision, and negotiable securities been issued to *bona fide* holders upon the strength of it. And finally that there is nothing in the decisions of the Courts of Tennessee on the general question of the unconstitutionality of the law, to embarrass this Court in so holding.

Second Point.—*Even though the 25th Section of the Act of March 9, 1867, should be condemned as unconstitutional in all its parts, yet the subscription to the stock made by the Commissioners, and the bonds issued by them while in the undisturbed tenure of their office as Justices of the County Court, are good and binding as regards third persons and the public, including the holders of the bonds, as the acts of a* DE FACTO COURT *or of* DE FACTO OFFICERS.

(*a.*) Clearly, there was *legislative authority conferred upon the* COUNTY *itself* by the Act of February, 1867, to subscribe for the stock and to issue the bonds. That was the clear intent of the Legislature in that Act. The power conferred, it is true, was to be exercised on the part of the *County* by certain designated agents, viz., the Justices of the Peace assembled in the County Court; but the subscription was to be the subscription of the *County*, and the bonds were to be the bonds of the *County*. The power was not vested in the agents, but in the principal, the *County*, to be exercised through the agents. We, therefore, challenge at the outset the proposition laid down in all of the Briefs filed on the part of the Defendant in Error, that the power was conferred upon the Justices of the

County Court, as distinguished from the *County* itself. It was conferred upon them only as *representing*, and as the *agents* of the *County*.

It is utterly different from the frequent case of a power conferred upon a County to subscribe, &c., if and when the inhabitants, or some specified proportion of them, shall have so voted. In that case, the legislative authority does not vest in the County, and the enactment purporting to confer it does not take effect, unless and until the people shall have so voted, such vote being an express condition precedent, without performance of which the legislative authority never arises. Here, on the contrary, is a clear grant of authority to the *County* to be exercised by certain agents, which agents, as we have seen, may at the will of the Legislature be changed. It is absurd therefore to claim that the authority or power belonged to the Justices of the Peace, or to the County Court as a legal entity distinct from the *County*. The *County* was the party to be charged. It alone was authorized to incur the liability, but through the agent appointed by the State, the County Court. That this was the distinct intent of the Legislature is clear, not only from the essential nature of the subject involved in the legislation, but particularly by the use of the term "*County subscription*" in the Act of February 25th, 1867, and by the terms used in the subsequent Act of November 5, 1867, describing the legislative authority given by the former Act, and amending that Act as follows:

> "That the subscription authorized in said sixth section to "be made to the capital stock of the Mississippi Railroad "Company by the *Counties* along the line of said railroad," &c.

It was also expressly admitted by the pleadings (Rejoinder, p. 11):

> "That *it* [*the County*] had power and authority to make a "subscription, and issue bonds and coupons in payment "therefor to said railroad company *through its regularly* "*organized County Court.*"

(*b.*) The authority to subscribe and issue the bonds having thus been conferred upon the *County*, to be exercised on its behalf by the County Court, the Board of Commissioners attempted to be created by the Act of March 9, 1867, entered upon the discharge of all the official functions apparently conferred upon them by that Act, and continued to discharge them for more than two years and a half until November 15, 1869. Upon bill filed in the Court of Chancery, they were adjudged by the Chancellor to be lawfully in office. "*They were sustained therein by the State authorities*," as was subsequently said by the Supreme Court of Tennessee, in the case of *McLean* vs. *The State*, 8 Heisk, at p. 235. Thus under the supposed authority of the Legislature, of the executive power of the State, and of the branch of the judicial power of the State having jurisdiction in the premises in the first instance, the Commissioners acted as the Justices of the County Court, and in so doing, and in assuming to be such Court, they made the subscription and authorized the issue of the bonds in suit at the regular Term of the Quarterly Court of the County, held by them in January, 1869, at a time when for more than one year and a half all the world had apparently acquiesced in their official authority. This also is expressly admitted by the pleadings, at page 12 of the Rejoinder, as follows:

> "They [*the Commissioners*] were in possession and assum-
> "ing to exercise the powers, functions and jurisdiction of the
> "*County Court* of Shelby County, and assumed to make said
> "subscription *as such*, and issue, make and deliver said bonds
> "as aforesaid * * * * * * That
> "said County Commissioners were *an assumed Court*, unlaw-
> "fully claiming to be and represent the *County Court* of
> "Shelby County."

The Rejoinder, at the same page, further adopts the allegations of the bill in *Walker* vs. *Merriman*, in which it was expressly alleged, (p. 81):

> "On the first Monday of April, 1867, the date to which
> "they had adjourned at the last regular term of said Quarterly
> "Court, complainants met at the Court House, in Memphis,
> "the proper place of holding the said Court, to open and

"hold said term of said Quarterly Court, when and where they "found defendants in possession of and occupying the "Court House, *assuming to hold said Quarterly Court*, and ex- "ercising the functions and powers unlawfully of complain- "ants when assembled as such *Quarterly Court.*"

(*c.*) The Court will particularly observe that the 25th Section of the Act of March 9, 1867, did not abolish or attempt to abolish the County Court, known as the Quarterly Court of the County. It merely substituted the Commissioners as the Judges to hold that Court, in place of the Justices of the Peace, and vested in them all their powers and duties. The identity of the *Court* was preserved, and its powers, functions and jurisdiction remained unaltered. As it was established by the Act of December 3, 1835, entitled "*An Act to reorganize the County Courts in this State*" (Public Acts 1835–6, Chap. VI., p. 45), and subsequent Acts amending the same, so it continued after the Act of March 9, 1867, with its powers uncurtailed and its functions unchanged. It is true, that in the opinion of the Court in *Pope* vs. *Phifer*, the latter Act is referred to as supplanting or abolishing the County Court, but it will be observed that the whole drift of the opinion is as to the unconstitutionality of the Act, as an attempt to substitute for the Justices of the Peace, elected by the people, and assembled as Judges of the County Court, Commissioners to be appointed by the Governor. By the Act of March 9, 1867, after the 22d and 23d Sections, providing for the appointment or election of the members of the Board of Commissioners, and the bonds to be given and the oaths to be taken by them, the 24th Section expressly enacts :

"That the Board shall hold four sessions annually, at the "times now provided by law, *for the holding of the regular* "*terms of the Quarterly Court of said County*, and that the "*Clerk of the County Court* of said County shall be the Re- "corder of said Board, *and shall discharge all the duties in* "*reference thereto which he is now required to perform as Clerk* "*of the said Quarterly Court.*"

And then comes the 25th Section, which vests in the Board

> "All the powers and duties which are now vested in and "performed by the *Quarterly Court* of said County."

And in the enumeration of *additional powers* conferred upon them, when it comes to subscribing for stock in Railroads, it is the stock

> "Which the *County Court* of Shelby County has been au- "thorized by general and special law to subscribe."

And, as has been seen, the whole contest in *Pope* vs. *Phifer*, and in *Walker* vs. *Merriman*, was between the ousted Justices of the Peace and the newly installed Commissioners, for the possession of the *County Court*, of which everything, except the internal composition of its members, remained as it had been established by the Constitution and previous laws.

(*d.*) The question, therefore, is whether the acts and doings of the Commissioners thus holding the County Court, though wrongfully installed under an unconstitutional law, performing all the functions and duties of the Court for more than two years and a half, are to go for nought, or whether, as to the public and third persons, they are binding and effectual. On this proposition we assert, without the fear of contradiction, that, although their tenure of office may have been unconstitutional and illegal, they were *de facto* officers, and their acts as such were, as to the public and third persons, just as binding and effectual as the acts of the Justices of the Peace assembled in the County Court would have been, if the statute installing the Commissioners in their place had not been passed. And, as a part of this proposition, we submit that, so far as the Supreme Court of Tennessee in the *Butterworth case* decided to the contrary, its decision is contrary to the well settled law on the subject.

This is not a question of local law, but of common law and common sense, and, so far as it affects the integrity of negotiable securities issued by such officers, it is one of those questions of commercial law which, under all circumstances, this Court has insisted upon deciding for itself.

In two cases, at least, it has already considered the point.

In *Cocke* vs. *Halsey*, 16 Peters, 71, one Puller assumed to act as Clerk of the Probate Court after the term of the Court for which he was appointed Clerk *pro tempore* by the Judge had expired. It was claimed that under the Constitution and laws of Mississippi his acts were without color of authority and void, and the Court below so instructed the jury. But this Court held otherwise, and reversed the judgment, expressing the opinion that, even if the Judge of Probate had no power to appoint a Clerk *pro tempore*, to hold after the term had expired, yet his acts, after the term, were good as to third persons having an interest in them, as the acts of a *de facto* officer.

And DANIEL, *J.*, says, at pp. 86–87:

> "If, then, the acts of the Clerk of Probate depended for their "validity upon the principles which apply to the acts of officers "*de facto*, a just interpretation of the authorities adduced on "behalf of the plaintiff in error gives validity to both. That the "judge had power to appoint a clerk *pro tempore* seems never to "have been questioned. That he did appoint is equally indisput-"able. The irregularity alleged was in the failure to limit the "appointment to the term of the Court. *Admit, for the present,* "*that the appointment should have been thus limited, and that the clerk* "*has admitted the deed to probate after the term, yet, in his character of* "*clerk, was he not within the very definition of the authorities, and* "*within the concessions of the counsel clerk,* DE FACTO *acting* COLORE "OFFICII, *and must not his acts, therefore, be valid, so far as regards* "*third persons who are interested in them? An affirmative answer to* "*this inquiry is unavoidable.*"

The Court will observe that the arguments overruled by the Court in *Cocke* vs. *Halsey* are the same that are here presented by the Defendant in Error, viz., that

the tenure of office by the Clerk after the term, was prohibited by the *Constitution*, which required all clerks of probate to be elected by the people, and was therefore void; that holding thus by appointment, where election was required, it was the *usurpation* of the office without authority or the color of authority; and that he was not Clerk *de facto* under color of right, but a mere usurper, &c., &c. (p. 83).

In the very recent case of *County of Ralls* vs. *Douglass*, 105 U. S., 728 (Oct. 7, 1881), this Court went fully to the extent now claimed, in enforcing the obligation of bonds issued by a *de facto* County Court, of which the President was acting without right to the office, but under color of title.

WAITE, *C. J.*, who delivered the opinion of the Court, says :

> " If we understand correctly the questions presented in " this case, they are :
>
> " 1. Whether, if county bonds, issued in Missouri by a " *de facto* County Court are sealed with the seal of the Court " and signed by the *de facto* president, they can be impeached " in the hands of an innocent holder by showing that the " acting president was not *de jure* one of the justices of the " Court. * * * * * * *
>
> " 1. As to the competency of the Court.
>
> " In no State is it more authoritatively settled than in Mis- " souri, that acts of an officer *de facto* (although his title may " be bad) are valid, so far as they concern the public, or the " rights of third persons who have an interest in the things " done. In *State* vs. *Douglass* (50 Mo., 593, 596), the " Supreme Court of that State said : ' Without this rule the " business of a community could not be transacted. The " public are necessarily compelled to do business with an " officer who is exercising the duties and privileges of an " office under color of right, and to say that his acts as to " strangers should be void, would be productive of irrepar- " able mischief. It would cause a suspension of business till " every officer's right *de jure* was established.' * * * This " is conclusive. The question here is not whether Dimmick " was *de jure* Probate Judge of Ralls County, but whether he

" was acting under color of right as a justice and president of
" the County Court. That is averred in the petition and not
" denied in the answer. His right to the office is one thing;
" his action, while exercising the duties, another."

The reasons here adopted from the Missouri case cited apply with striking force to the case at bar. Were the people of Shelby County, and all persons having necessary dealings with them, to wait for two years and a half for a County Court, until it should be determined by the Court of last resort whether the old Justices of the Peace or the new Commissioners were the *de jure* Judges to exercise its jurisdiction, especially after the Chancellor, who was competent to decide, had decided in favor of the latter? Was the entire administration of justice within the jurisdiction of the County Court to be suspended for that long period? Were all the important affairs and property of the County which were committed to its charge to go to rack and ruin? Or, while the one set of claimants to places in the Court, acquiescing for the time being in the decision of the Court of first instance, peacefully abstained from attempting a forcible entry and detainer of the office, and the other set of claimants under the protection of the same authority went on and administered the functions of the Court and office, with the acquiescence of all the world, are their acts in the exercise of the office to be recognized and held valid on the great principle of public necessity?

We come now to the decision of the Supreme Court of Tennessee in the *Butterworth Case*, which held that warrants on the County Treasury, issued by the Commissioners, and signed by the President, and countersigned by the Clerk of the County, were void in the hands of innocent holders for value—a decision utterly at variance with the cases already cited in this Court, and with the great array of authorities hereafter referred to.

First.—The Court adopts its own prior decisions in *Pope* vs. *Phifer*, and *Walker* vs. *Merriman*, on the

unconstitutionality of the Act of March 9, 1867, and concludes from this, that being unconstitutional it is as if it had never been, and that rights cannot be built up under it, and that contracts which depend upon it for consideration are void. Recognizing, however, that this did not dispose of the case against the claim that the warrants were issued by *de facto* officers, it disposes of this question by declaring that as the President of the Board who signed the warrants came into existence by the Act as part of the Board, the decisions which held the Act to be unconstitutional necessarily adjudged the office of Commissioner to be a nullity *ab initio*. That is to say, that he could not be a *de facto* officer, since there was no legal Board or office in existence, which was being improperly held, to give to the acts of such incumbent the validity of an officer, there being no vacancy in the *legal* organization of the County Court.

This, we submit, is a pure begging of the question. It is true that there was no vacancy in the *legal* organization of the *County Court*. The Justices of the Peace who, as was finally held, would have been entitled to hold it all the while that they were excluded under the decision of the Chancellor, were in legal and official existence as Justices of the Peace. But they were excluded. They did abstain. There was a practical and actual vacancy in the office of the County Court, in the possession and exercise of the functions and jurisdiction of that Court, into which the Commissioners were installed instead of the Justices of the Peace. The office in dispute was the County Court, as the records in all the cases show. There were certain Judges *de jure* of that Court, who for two years and a half abstained from asserting or exercising their functions. There were in their place certain judges *de facto*, called not Judges but Commissioners, just as the former had been called not Judges but Justices of the Peace, and the Commissioners as officers *de facto*, officers in *fact*, as distinguished from officers of *right*, administered the jurisdiction of the Justices of the Peace within and as

constituting the *County Court*, for the possession of which the contest had arisen.

The only authority cited by the Court for their extraordinary decision in the *Butterworth Case* is the still more extraordinary case of *Hildreth* vs. *McIntyre*, 1, J. J. Marshall, 206, a case arising under circumstances so peculiar as to deprive it of any weight as an authority on the general question.

There was a Constitutional Court of Appeals for the State of Kentucky which could not be supplanted by the Legislature. That body, nevertheless, by an Act passed December 24, 1824 (Acts of Kentucky, for 1824, chap. 53, p. 44), entitled "*An Act to repeal the law organizing the Court of Appeals, and to reorganize a Court of Appeals,*" abolished the Constitutional Court and attempted to establish in its place a *new Court of Appeals.* By a subsequent Act, passed January 6, 1825, the Legislature fixed the salaries of the Judges of the *new* Court of Appeals, and prescribed that the *new* Court should hold its first session on the fourth Monday of January, 1825 (Acts of 1824, ch. 102, p. 107). The next Legislature, by an Act passed over the veto of the Governor, December 30, 1826 (Acts of 1826, ch. 8, p. 13), reciting the former Acts as an attempt to abolish the Constitutional Court and erect one on its ruins, and "whereas the above recited Acts have been decided by the good people of this Commonwealth at two successive elections to be dangerous violations of the Constitution, and subversive of the long-tried principles upon which experience has demonstrated that the security of life, liberty and property depend, and the present Legislature concur most solemnly with the people;" and further reciting "that the Judges of the Constitutional Court had *remained in office* notwithstanding the passage of said Acts, and *had neither resigned nor been removed,*" it proceeds to repeal and declare null and void the said recited Acts, and revives and re-enacts every law which was changed or repealed thereby, and declares them to be in full force and to have in all respects the same effect and operation as if said recited Acts had not been

passed. In the meantime, as appears by the published Reports, the two Courts of Appeals both sat. The new and usurping Court held a Spring Term in 1825, at which many cases appear to have been heard and decided, and a Fall Term in 1825, ending October 25th, at which a very few cases appear to have been heard and decided, the reports of both terms making up Vol. II. of *Monroe's Reports.* An election immediately ensued, which seems to have terminated their action. Meanwhile the Constitutional Court was also sitting, hearing and deciding appeals. It held a spring term in 1825, at which it decided one case, and a fall term in 1825, beginning November 10, apparently the first week after the annual election; and the cases decided are reported in Vol. III. of *Monroe's Reports.* After this, in 1829, the case of *Hildreth* vs. *McIntyre*, 1 J. J. Marshall, 206, came before the Court of Appeals, in which the only question was whether the appointees of the Governor, who had acted in the new Court, "*were Judges of the Court of Appeals.*" And the Court held that as there could be only one Court of Appeals under the Constitution of Kentucky, it was, therefore, impossible, in the nature of things that there should be a *de facto* Court of Appeals; that there might be *de facto* officers, but there could not be a *de facto* office, and that the gentlemen who had directed the dismissal of the appeal before them, which was an appeal to the Court of Appeals, and the one who certified the order, being their clerk, did not hold office in said Court. The decision of the particular matter so brought before the Court was undoubtedly right, but their *dictum* that there can be no such thing as a *de facto* Court may be questioned. At any rate this Court, in *County of Ralls* vs. *Douglass*, spoke as if there might be. But be that as it may, the decision has no relevancy to the present case, where there was no attempt to create an *additional or substituted* Court, with new jurisdiction and new functions, but the Constitutional Court being continued with jurisdiction and functions unchanged, the Legislature with-

out constitutional warrant attempted to substitute for the Justices of the Peace, who ought to have held it, Commissioners, who did hold it and exercised all its powers for two years and a half, with the acquiescence of the people, the government and the adverse claimants. No decision can be found, except the *Butterworth Case*, which denies to officers so acting the full character of *de facto* officers.

And if the Court of Appeals of Kentucky is found to have held that, the acts of officers appointed by and acting under and pursuant to an unconstitutional law, performed *before* the unconstitutionality of the law has been judicially determined by any Court, are not acts done under color of authority and valid as respects the public and third persons interested in their performance, as the acts of officers *de facto*, it is contrary to the whole body of authority on the subject, and is not the law.

The other cases relied upon in the Briefs filed on the part of the Defendant in Error, equally fail to support its contention.

In *Carlton* vs. *The People*, 10 Mich., 250, wrongly cited as 10 *Minn.*, a county was organized by setting off certain townships from existing counties, by an Act passed February 4, 1859, which provided for an election of the officers of the new county "*at the election to be held in April next*," and such officers were to enter upon their duties "*on the first day of June next.*" But the Act not having been enacted to take immediate effect, did not take effect under the Constitution until May 16, 1859. Nevertheless, an election for county officers was held in April, 1859, and the persons so chosen qualified and entered upon their duties at the time specified. Carlton, a Supervisor of a town in the new county, was indicted for neglecting to present the assessment roll of his township to the Supervisors of the new county so elected. He pleaded that he was not bound to do so, because the Act provided for the election prior to the day when it could

constitutionally take effect. This plea was overruled by the Court below, and such ruling was *affirmed* on appeal by an even vote, four judges hearing the appeal. The prevailing opinion by the Chief Justice and Judge Manning, who concurred with him held (and their opinion was the law of the case) that, as to the rights of third persons, and of the public, the election was sufficient.

And MARTIN, *C. J.*, says:

> "The question of the legality or illegality of his (the Clerk
> " of the County appointed by the Board of Supervisors)
> " tenure of office can only be raised in a direct proceeding
> " in which he was a party. It would be impossible to main-
> "tain the supremacy of the laws, if individuals were at
> " liberty in a collateral manner to question the authority of
> " those who in fact hold public offices under color of legal
> " title. * * * Whether the Legislature could constitution-
> " ally authorize the election of County officers before the Act
> " creating the County took effect, I will not inquire, for as
> " there was such an election, and the persons chosen entered
> " upon the duties of their offices, they were *de facto* officers,
> " and Carlton could not refuse to perform his duty as Super-
> " visor under the pretext that the Clerk or any other officer
> " was not constitutionally chosen."

The observation in the opinion of Campbell, *J.*, dissenting, that there could not be an office *de facto* where no officer *de jure*, was provided for, is inapplicable to the case at bar, where there was an office legally existing, namely, the *County Court*.

In *Ex parte Strang*, 21 Ohio St., 610, another case cited, it was expressly held that a police judge appointed by the Mayor, under power of appointment conferred upon him by a law which might be unauthorized by the Constitution, was yet a judge *de facto*, and that his acts, when questioned collaterally, were as binding as those of an officer *de jure*.

In *Hooper* vs. *Goodwin*, 48 Me., 79, the only other case cited, the point did not arise. There was no question as to the constitutionality of any law under which office

was held, but the point being taken collaterally that a justice who was commissioned and acted, was a minor and therefore inelligible, it was overruled, the Court declaring that an officer *de facto* is one who executes the duties of an office under some color of right, some pretense of title, either by election or appointment.

The following cases must be deemed to have established the law, that office held under a law enacted by the Legislature, though void as being unconstitutional, is before it is adjudged to be so, held under such color of title and color of authority as make the person holding the office an officer *de facto*, and that acts of officers performed under such a law are valid as respects the public and third persons interested therein.

The great and leading case, a landmark of the law, is *State* vs. *Carroll*, 38 Conn., 449, where the masterly opinion of *Chief Justice Butler* seems convincing and conclusive enough to settle the law forever. The Constitution of Connecticut had provided that all judges should be elected by the General Assembly. But an Act of the Legislature had authorized the Clerk of a City Court, in the absence of the Judge, to appoint a Justice of the Peace to hold the Court. It was held that, whether the law was constitutional or not, the justice so appointed and acting was an officer *de facto*, and that judgments rendered by him were valid. The learned Chief Justice first reviews all the English cases, and demonstrates that the idea that "*color of authority*" is sufficient to constitute an officer *de facto*, and can be conferred by a body or person not having power or *prima facie* power to elect or appoint in the particular case has never been questioned in England. And after citing the whole line of American cases to the same effect, he states as follows the principles on which the acts of *de facto* officers are held binding:

> "The *de facto* doctrine was introduced into the law as a "matter of policy and necessity to protect the interests of "the public and individuals where those interests were in- "volved in the official acts of persons exercising the duties of

"an office without being lawful officers. It was seen that "the public could not reasonably be compelled to inquire "into the title of an officer, nor be compelled to show a title, "and these became settled principles in the law. But to "protect those who dealt with such officers when apparent "incumbents of office under such apparent circumstances of "reputation or color as would lead men to suppose they were "legal officers, the law validated their acts as to the public "and third persons on the ground that, as to them, although "not officers *de jure*, they were officers in fact, whose acts "public policy required should be considered valid. It was "not because of any quality or character *conferred upon the* "*officer*, or attached to him by reason of any defective election "or appointment, but a name or character given to his acts "by the law for the purpose of validating them. * *

* * * * *

"'When one is found actually in office, and openly and notoriously exercising its functions in a limited district, so "that it must be known to those whose official duty it is to "see that the office is legally filled, and also that it is not "illegally usurped; and when this goes on for a great length "of time, or for a period which covers much of the time for "which the office may be lawfully conferred, it would be "entrapping the citizen and betraying his interests if, when "he had applied to the officer *de facto* to do his business, and "got it done, as he supposed, by the only person who could "do it, he could yet be told that all that was done was void "because the public had not duly appointed that person to "the office which the public allowed him to exercise'" (4 *Iredell*, 168). * * * * *

"An officer *de facto* is one whose acts, though not those of a "lawful officer, the law upon principles of policy and justice "will hold valid so far as they involve the interests of the "public and third persons where the duties of the office were "exercised:

"*First.*—Without a known appointment or election, but "under such circumstances of reputation or acquiescence as "were calculated to induce people, without inquiry, to sub-"mit to or invoke his action, supposing him to be the officer "he assumed to be.

"*Second.*—Under color of a known and valid appointment "or election, but where the officer had failed to conform to "some precedent, requirement or condition.

"*Third.*—Under color of a known election or appoint-"ment, void because the officer was not eligible, or because

"there was a want of power in the electing or appointing "body, &c.

"*Fourth.—Under color of an election or an appointment pursuant to "a public unconstitutional law before the same is adjudged to be such.*"

And this last proposition that the acts of an officer holding, under an *unconstitutional* law, are valid and binding as regards the public and third persons, until such law is adjudged to be unconstitutional, had then (in 1871), as Chief Justice Butler shows, already been established in the following cases:

Brown vs. *O'Connell*, 36 Conn., 447.
Taylor vs. *Skrine*, 3 Brevard, 516.
People vs. *White*, 24 Wendell, 520.
Clark vs. *Comm.*, 29 Penn. St. Rep., 129.
Comm. vs. *McCombs*, 56 Penn., 436.

In *People* vs. *White*, Senator Verplanck used this language which covers the whole ground:

"In respect to the judicial character of the aldermen I "agree with the Supreme Court that the aldermen, whether "constitutionally or not, are judges of the Court of Oyer and "Terminer—are so *de facto*—their commissions being written "in the statute book which is to be presumed valid and con- "stitutional throughout, until it is otherwise decided as to "any provision. I agree, therefore, that their acts as judges "cannot be impeached subsequently, collaterally, or by "private suit or criminal proceeding against them as in- "dividuals, under any view of their constitutional right."

In *Commonwealth* vs. *McCombs*, the question whether an unconstitutional Act of the Legislature was sufficient to give color of title and constitute an officer appointed by and acting under it an officer *de facto*, came up for the second time in Pennsylvania, and was again determined in the affirmative. Judge Strong, afterwards of this Court, gave the opinion and said:

"*When he who is exercising the duties of an office is acting under "the apparent authority of an Act of Assembly, his title to the office is*

> *" not to be assailed collaterally. This, I understand to have been again " and again decided. An Act of Assembly, even if it be unconstitu- " tional, is sufficient to give color of title, and an officer acting under it " is an officer* DE FACTO."

The broad rule so emphatically laid down in *State* vs. *Carroll*, that office held under an unconstitutional law, before its unconstitutionality is adjudged, is held under color of title so as to constitute the holder an officer *de facto*, in the fullest sense of that term, has since been adopted in the following cases:

In *Re Ah Lee*, 5 Fed. Rep., 899, Mr. Justice Deady, after a careful review of the authorities, in answer to the points made for the prisoner, who claimed to be discharged on *habeas corpus*, after being tried and convicted for murder, before the "*Circuit Judge*," among which points was this: "That a person cannot be considered an officer *de facto*, unless the office he is said to be in legally exists, and there being no such office as '*Circuit Judge*' established by the Constitution, the person who acted as Judge on the trial of the prisoner, in the Court below, was not even a *de facto* Judge." says:

> " Thus it will be seen that the almost unbroken current of " authority is against the claim made for the petitioner, that " no one can be an officer *de facto* under a void law, or an " illegal appointment; and admitting that the Judges who " tried and heard the action against the petitioner in the State " Courts, were appointed Judges of those Courts under an " unconstitutional law, yet they were at the least such Judges " under color of right and authority, and therefore they were " and are Judges *de facto*, and their acts are valid and binding " as to third persons."

In *State* vs. *Bloom*, 17 Wis., 521, where a person was indicted for a crime, and was tried, convicted and sentenced at a term of a Circuit Court held by a person who exercised the office of Judge of said Court under an appointment by the Governor *made without authority of law* (*there being another person entitled to exercise said office*), the sentence was nevertheless held to be valid and binding.

In *Demarest* vs. *Wickham*, 63 N. Y., 320, the Court of Appeals of New York said:

> "If the provision in the Act of 1873 for the election of
> "Aldermen in the City of New York upon the principle of
> "minority representation, is unconstitutional and void, for
> "the reason that it deprives the electors of a constitutional
> "right to vote for all the Aldermen to be elected in the
> "district in which the electors resided, and for all the Alder-
> "to be elected at large, and the election held thereunder in
> "the fall of 1874 was void, it conferred no legal right to the
> "office of Aldermen upon the persons voted for and returned
> "as elected to that office at that election. Their election
> "followed by their assumption of the office constituted them
> "officers *de facto* but not *de jure*."

Kimball vs. *Alcorn*, 45 Miss., 151.

In *Fleming* vs. *Mulhall*, 9 Mo. App. Rep., 71, where a judge denying the constitutionality of a law which ousted him before the expiration of the term for which he was elected, held over and continued to exercise his functions after a successor had been elected, the Court said:

> "If because he denied the validity of the Act of the Legis-
> "lature, he still held on to his office and still continued to act
> "as a justice, and did this in good faith, there was such public
> "reputation and acquiescence as to bring the case within the
> "rule to make him a *de facto* officer, and to validate his acts
> "so far as the public and third persons are concerned, what-
> "ever might be the consequences to himself."

In *Woodside* vs. *Wagg*, 71 Me., 207, the Supreme Court of Maine adopts and reasserts the propositions of Chief Justice Butler in *State* vs. *Carroll*.

In *Sheehan's Case*, 122 Mass., 445, the Constitution of Massachusetts declared that no judge of any Court of the Commonwealth shall at the same time have a seat in the Senate or House of Representatives. A judge, after being elected and taking his seat in the House, continued to act as judge, and a prisoner convicted before him sued out a *habeas corpus*.

GRAY, *C. J.*, after declaring him nevertheless to be a justice *de facto*, says:

> "Upon well settled principles it would be inconsistent
> "with the convenience and security of the public, and with
> "a due regard to the rights of *one acting in an official ca-*
> "*pacity under the color of and a belief in lawful authority to*
> "*do so*, that the validity of his acts as a justice should be dis-
> "puted, or the legal effect of his election and qualification as
> "a Representative be determined in this proceeding to
> "which he is not a party."

The learned Chief Justice cites *Fowler* vs. *Bebee*, 9 Mass., 231, 235, where, indeed, *Chief Justice Parsons* states the law exactly. The statute creating the *County of Hampden* declared that it should take effect from and after the 1st day of August, 1811. On the 23d of May, 1811, the Governor appointed Smith Sheriff. On the return of a writ served by this Sheriff's deputy, the defendant pleaded in abatement the statute and the appointment, and that at the time of it there was no such County as Hampden and *no such office* as Sheriff of Hampden. *Bliss*, for the defendant, insisted that at the date of Smith's commission *no such office* existed as that to which the Executive undertook to appoint him. The Solicitor-General, in reply, said:

> "To say that the appointment was to an office not in exist-
> "ence is but begging the question. Every office necessary
> "to the due organization of the County existed from the
> "passing of the law."

Parsons, *C. J.*, in his opinion, says:

> "We do not decide whether he is Sheriff *de jure* of the
> "County of Hampden, or has intruded himself into the
> "office. But, as we are of opinion that he is *Sheriff in fact*
> "of that County, the plea in abatement must be adjudged
> "bad."

The Courts of Tennessee seem also to have acquiesced in the doctrine.

Ward vs. *The State*. 2 Cold., 605.

Blackburn vs. *The State*, 3 Head, 690.

(*e.*) That, supposing the officer whose act is relied upon to be acting under such color of title as to constitute him an officer *de facto*, *an obligation* executed by him is as binding on behalf of third persons as any other official act, seems never to have been questioned. It was so decided by this Court in *County of Ralls* vs. *Douglass*, cited *supra;* and it was so held in *Knight* vs. *Corporation of Wells*, Luttwych, 508, and in the two centuries intervening has never been disputed.

In *Knight* vs. *Corporation of Wells*, the action was debt on a bond in the name of The Corporation of Wells. The Corporation appeared and pleaded *non est factum*. The special verdict found, that by the charter the Mayor should be chosen out of the most sufficient citizens, but that Day, by whom the bond was signed as Mayor, was not, when chosen, a member of the Corporation. Upon this special verdict it was resolved:

> "That the bond was good, though it was objected that it was "signed by a Mayor *de facto*, and one not qualified by the "last charter to be Mayor, neither did it appear how he was "chosen, for all ministerial and judicial acts done by a "Mayor only *de facto* are good. It is true the Corporation "may displace him, but so long as he remains in office, he "hath power to seal bonds. There is a distinction made in "our books between a person who usurps an office and one "who comes in by color of an election, viz., the acts of the "one are good, but not of the other. And therefore where "two Abbots were chosen, one by the majority of the monks, "and the other by the less number, and he got into posses-"sion by color of that undue election, though he was not the "lawful Abbot, but only Abbot *de facto*, and his acts are "good and shall bind."

Thus we claim it to be established beyond question, that the holding of office under an unconstitutional law is a holding under color of title so as to constitute the holders officers *de facto* until their tenure is terminated by some direct proceeding instituted for that purpose, and that until then their acts and doings are, as to the public and third persons interested, just as valid and binding as those of officers *de jure*. The

rule covers the case before the Court, and the exceptional cases where there has been a controversy between two tribunals, the one an old and constitutional one, and the other a new and unconstitutional one, each asserting the right to act, and acting at the same time, where the Court has condemned the latter as not being an existing office, and so held that the party claiming to hold it could not be an officer *de facto*, have no application to the case, and the opinion to the contrary in the *Butterworth Case* is contrary to law.

Here certainly there was an office—the Quarterly Court of the County—filled for two years and a half with the acquiescence of the State, and the express approval of the Court having jurisdiction of the matter, by the officers installed in it under the Act of the Legislature which is claimed to be unconstitutional. It matters not that they were called by the Act Commissioners instead of Justices of the Peace. The name is of no consequence. They were in fact in the actual discharge of the functions of the County Court, and among the rest of the functions previously conferred by law, general or special on the County Court, which they exercised, they subscribed for the stock and issued the bonds in suit under color of authority. It was not unlike the case of the Great Seal being put in Commission when the Commissioners discharged the duties and powers of the Court of Chancery, but the functions and jurisdistion of the Court remained unchanged.

If any of the acts of the Commissioners as to third persons or as to the public were valid and binding, this act of subscription and issuing the bonds was so, for, as has been seen, the rule covers as well the signing and sealing of bonds for the corporation by *de facto* officers as any other acts. If their judgments bound the parties to suits tried before them, if wills admitted to probate by them, and partitions of lands by them, gave title, if their purchases or orders in respect to County property during their tenure of office were available to third parties—in short, if *any act* of theirs during their undisturbed

tenure of office was valid and binding in favor of a third party, this subscription was binding, and these bonds are the valid obligations of the County. That their general acts were operative as the acts of *de facto* officers is established by the authorities already referred to. It cannot be that for two years and a half the County was without a Court or a local Government, which, by the Code of Tennessee is entrusted to the County Court. To every intent and purpose the Government and affairs of the County were all the time administered by the Commissioners, holding the regular terms of the County Court, and none the less because another set of officials, really entitled to hold the County Court in their stead, acquiescing in the adverse decision of the Chancellor, awaited the result of the appeal from that decision without a resort to a *quo warranto*. The affairs of the County were not remanded to chaos, they were fully administered all the while by the *de facto* officers, who were as such submitted to by the whole County. Any other hypothesis would be subversive of the peace and order of society, the preservation of which, on grounds of a wise and universally recognized public policy, is the foundation of the *de facto* rule.

It appears by the Code of Tennessee of 1858, ~~p. 757, § 1201~~, that the County Court had, during the period in question, ~~original jurisdiction in the following cases:~~

1. Probate of wills and granting letters testamentary and of administration.
2. Settlements of executors and administrators.
3. Partition and distribution of estates of decedents.
4. Settlement of insolvent estates, including sale of real and personal property.
5. All matters of guardianship for minors and lunatics.
6. Allotment of dower.
7. Partition of lands.
8. Inquisition *de lunatico inquirendo*.
9. Binding out of apprentices.

~~And~~ concurrent jurisdiction with other Courts in the following cases :

~~1. To appoint Commissioners to make sale of real and personal property.~~

2. Establishment and general supervision of roads and ferries, water courses, and local improvements.
3. Erection and control of public buildings.
4. Laying taxes.
5. Appropriating moneys for County purposes.

Were all these powers in suspense, and all the acts done by the Commissioners, as if in exercise of them for two years and a half, void acts ?

Third Point.—*By the acts of the County Court subsequent to their reinstatement which took place in November, 15th, 1869, the previous issue of the bonds was ratified by the County.*

(*a.*) The acts referred to are fully displayed in the foregoing statement. They consist of all those kinds of acts *in pais*, which are usually regarded by Courts as equivalent to a formal and express ratification by a principal of acts previously done on his behalf and in his name by one assuming to act for him, but with imperfect authority or no authority at all.

They kept the stock obtained by the original subscription : they confirmed and collected the tax levied therefor by the Commissioners, and applied the same to the payment of the bonds : they voted upon the stock at all meetings of the Company: from year to year they levied and collected a special tax for the payment of the interest on the bonds, and the instalments of principal falling due; in this way they paid the entire issue of the bonds except about 88 bonds, and the interest upon those up to the year 1875 ; finally they voted for the consolidation of the Railroad

with the new Company, and upon that being consummated, exchanged their original stock for the stock of the new Consolidated Company, which they still hold and enjoy.

Of the quality and sufficiency of these acts to work a ratification, there can be no doubt. The only questions raised are :

1st. Whether the original issue of the Bonds can be ratified at all ?

2d. As to the effect of the constitutional provision of 1870 denying power to the Counties of the State to lend their credit without a prior vote of the people.

(*b.*) On the first question, the assertion is made on the part of the Defendant in Error that the issue of the bonds was without lawful authority, and therefore it is insisted that it was a void act, *i. e.*, no act at all, and incapable of ratification.

But there was complete legislative authority *to the County*—the party sought to be charged,—to make the subscription and issue the bonds. The intent to convey this authority *to the County* is clear upon the face of the Act of February 25, 1867, is reaffirmed with explicit particularity in the Act of November 5, 1867, and the language and purport of both Acts are inconsistent with any other intent or any less intent. Unlike the grant of power to a County, if the people shall first so vote, which has been held to be dependent upon a condition precedent, so that the power does not vest except and until the condition is performed—here is a present and immediate grant by the Legislature direct *to the County* to take effect immediately upon the passage of the Act without the intervention of any such vote. It is true that the power thus granted is afterwards to be exercised by the grantee, the County, through a certain agent, the County Court, but by the Act the power has vested in and remains in the *County*, and the question here presented is whether when such a power has been so

granted, and it has been exercised in the name and on behalf of the County by a *different* agent than that prescribed by the Legislature, the *County* can afterwards be bound by a ratification deliberately made by the very agent prescribed by the Legislature. We submit that this question must be answered in the affirmative, and that in the long line of decisions in this Court on the subject of ratification of municipal bonds defectively issued, this proposition is not denied. The cardinal point has always been, and in the nature of things must be, *Was there Legislative authority to the* COUNTY *when the bonds were issued?* Every defect but the want of that can be cured by ratification. That defect and that only is incurable, except by new action on the part of the Legislature conveying into the County the authority originally wanting.

(*c.*) Legislative grants of such authority to a County Court, or to any other representative body, have uniformly been construed and treated as grants to the *County.*

In *Ralls County Court* vs. *United States*, 105 U. S., 734, where the language of the Act was: "It shall be lawful for the *County Court* of the County to subscribe," &c., the Court referred to the power so granted as authority "granted by the Legislative branch of the Government *to a municipality or a subdivision of the State* to contract," &c.

So in *County of Daviess* vs. *Huidekoper*, 98 U. S., 98, where the language of the Act was the same, the Court says:

> "The persons who execute and deliver them—the officers
> "of the County Court in this instance—are the agents of the
> "municipal body authorizing their issue. * * * If these
> "agents exceed their authority as to form, manner, detail or
> "circumstance; if they execute it in an irregular manner, it
> "is the misfortune of the town or county, and not of the pur-

> "chaser. THERE MUST, INDEED, BE POWER, which, if formally "and duly exercised, will bind the county or town. No "*bona fides* can dispense with this, and no recital can excuse "it. * * There is no difficulty in appreciating the distinc- "tion stated; and we are now to ascertain whether the error "we are considering, assuming it to be one, arises from an "irregularity in the exercise of an existing power, or whether "there is total want of authority to act."

Again, in *Supervisors* vs. *Schenck*, 5 Wall., 772, where the Act authorized the *County Court* to subscribe and to issue bonds, the Court treats it throughout the opinion as a power *to the County*, and at page 779, speaks of it as follows:

> "Power in the COUNTY, therefore, to make the subscription, "purchase the shares and issue the bonds in this case, if the "proceedings were regular, is placed beyond all question. "Support to that position is hardly necessary, as it is settled "by the decisions of this Court as well as by the highest "judicial authority of the State."

And the Court held that the levy of a tax and payment of interest by the proper county authorities validated in the hands of *bona fide* holders for value bonds issued irregularly in virtue of a popular vote ordered by a *County Court*, instead of one ordered by the *Board of Supervisors*, as the Act required.

So in *County of Scotland* vs. *Thomas*, 94 U. S., 682, where the language of the Act was: "It shall be lawful for the *County Court* of any *County*, in which any part of the route of the said Railroad may be, to subscribe," &c, the power thereby conferred is referred to as being vested in the *County*, and the *County Court*, as in the previous cases, is regarded simply as the agent or representative of the *County*, having the power to make the subscription.

BRADLEY, *J.*, who delivered the opinion of the Court, says, at page 692:

> "The County Court of Scotland County, in the present "case, acted as the representative authority of the County "itself, officially invested with all the discretion necessary to

> "be exercised under the change of circumstances, brought "about by the consolidation in question. For, as before re- "marked, the County Courts, in reference to the subscription "in question, represented the Counties themselves, as their "officially constituted authorities. * * * The power "given to the County Courts intersected by the Alexandria "and Bloomfield Railroad to subscribe to its stock, was given "to them as representing the County. When they sub- "scribed for the stock, it was the COUNTY that subscribed."

Thus we claim that the gift of power to the *County Court* was Legislative authority to the *County*, to be exercised by the Court as its agent.

(*d.*) All the cases cited upon the Briefs filed on behalf of the Defendant in Error, where ratification was held to be impossible, are cases where there was no grant whatever of Legislative authority, or what is the same thing, where the grant offered by the Legislature was made expressly dependent upon a prior vote of the people of the County, which failing, the grant never took effect, and left the County as destitute of power as if the Act had not been passed.

Such were all the cases cited in Messrs. *Taylor & Carroll's* Brief.

In *Marsh* vs. *Fulton Co.*, 10 Wall., 676, and *Loan Association*, 20 Wall., 655, there was held to be no power in the Legislature to authorize the incurring of the obligation under the Constitution of the State.

Thompson vs. *Perrine*, 103 U. S., 806, was a case of *legislative* ratification, where there had been an exchange of bonds by the county officers without any legislative authority whatever to the *County* to make the exchange,

In *Harshman* vs. *Bates County*, 92 U. S., 569, the power was, by the Constitution of the State, made expressly dependent upon a prior two-thirds vote of the qualified electors of the county, city or town, and the Court held that this requirement was not met by

a two-thirds vote simply of those *voting* at the election.

In *Lewis* vs. *City of Shreveport*, 108 U. S., 282, the general principle is very strikingly illustrated. There had been no legislative Act whatever, and the Court held, that unless power has been given by the Legislature to a municipal corporation to grant pecuniary aid to Railroads, bonds issued for that purpose, and bearing evidence of the purpose on their face, are void even in the hands of *bona fide* holders, and that corporate ratification, without authority from the Legislature, cannot make a municipal bond valid which was void when issued for want of legislative authority to make it, which was but a reaffirmation of the same rule laid down in *City of Ottawa* vs. *Cary*, 108 U. S., 110.

The County Court, in the case at bar, is admitted to be the governing agency of the County. Assuming that the County can ratify, the County Court is the body to do it. Indeed § 402 of the Code of Tennessee, adopted in 1858, declares that

> "Every County is a Corporation, and the Justices in the "Court assembled are the representatives of the County, and "authorized to act for it."

And this Court, in the case of *Locomotive Works* vs. *Tipton*, 103 U. S,, 537, treated the acts of the County Court, which were relied upon for ratification of bonds, otherwise void for fraud in their inception, as in all respects the acts of the *County*. But it is claimed that express and specific legislative authority to ratify is necessary, and that such power to ratify is not embraced and involved in the power to subscribe and issue the bonds, which power was clearly vested in the County and in the County Court as its representative. In other words, it is claimed that no power short of the Legislature itself, could ratify the defect in the issue of these bonds. But we, on the contrary, submit that the Corporation, or that organic exponent of the

Corporation which had the power to do the act, had necessarily power to adopt and make binding upon the Corporation the same act which had previously been done in its name and on its behalf by an unauthorized agent. The distinction in this respect between municipal corporations and individuals as to ratification, is in the element of power. Where neither the Corporation itself nor its organic exponent, had the power —that is, legislative authority—to do the act at all by any agency, at the time when it was done, there, neither can afterwards ratify. But where it had at that time the power through its prescribed organic exponent to do it, and the act was done in its name and on its behalf by an unauthorized agent, it would seem necessarily to follow that the principal, through the agent prescribed by the Legislature to do the act, and still having the power to do it, must have the power to ratify it. In other words, that power existing in the Corporation to do the act both at the time of doing it, and at the time of the ratification, the same as in an individual, the same rule as to ratification must be applied.

Suppose that on the day after the actual issue of the bonds, the Board of Commissioners had abdicated the functions of the County Court, and that Court resuming its sessions, had resolved by the requisite majority that although the subscription made and the bonds issued in the name of the County by the Commissioners in its stead, had been previously unauthorized by them, yet, that as the County proposed to keep the stock, it approved and ratified the subscription and the bonds, can anybody doubt that they would have been as binding on the County as if the County Court had itself, in regular session, made the subscription and issued the bonds? And that is in substance what the County Court, after resuming its place, keeping and enjoying the stock for the County, did over and over again.

By their acts prior to the taking effect of the Constitution of 1870, the County Court clearly recognized and ratified the entire issue of bonds. Indeed,

in the highest form of ratification possible, the payment of the interest upon the whole issue and of that instalment of the principal falling due January 1, 1870 —they adopted and confirmed the whole.

(*d.*) The Constitution adopted in 1870 did not prohibit the County from ratifying the subscription and the issue of bonds which had been actually made in its name and in its behalf by an unauthorized agent before that Constitution went into effect, and at a time when it had complete legislative authority to incur the liability.

Section 29, Art. II., provides:

> "The credit of no county, city or town shall be given or "loaned to or in aid of any person, company or corporation, "except upon an election to be first held by the qualified "voters of such county, city or town, and the assent of three-"fourths of the votes cast at said election. Nor shall any "county, city or town become a stockholder with others in "any company, association or corporation, except upon a "like election, and the assent of a like majority."

This was in no respect equivalent to a prohibition to ratify or validate subscriptions made, or bonds issued, *prior* to the adoption of this amendment.

We rely again upon the proposition already presented, that at the time of the subscription and issue there was complete legislative authority in the *County* to make them, and that they had already been made in its name by unauthorized agents with that precise defect, and no other, to be cured.

The prohibition against *future* loans and *future* subscriptions did not disable the County, by its duly authorized organic representative, to cure this defect in previous transactions.

We agree that the Constitution of 1870 operates prospectively, and only prospectively, and because that is so, it cannot operate to prohibit the subsequent ratification by the County of an act previously done for and in the name of the County, and which the County itself at the time it was done had the legislative

authority to do, and which failed of complete validity, if at all, only because the wrong agent acted in the doing of it.

We submit that none of the many cases decided in this Court as to the effect of constitutional amendments militate at all against this proposition. It is only in cases where prior to the amendment there had been no legislative authority in the County, or no subscription had been made, or, in other words, where nothing had been done which could be ratified, that the subsequent power of ratification is denied.

In *Aspinwall* vs. *Daviess Co.*, 22 How,, 365, no subscription had been made, or attempted to be made, and it was held that a mere vote to subscribe was not enough; that it did not amount to a contract, and that a subscription made after the amendment was invalid.

In *Marsh* vs. *Fulton Co.*, 10 Wall, 696, there was no legislative authority to subscribe either at the time of the subscription or of the attempted ratification for the want of the performance of the condition precedent, the vote of the qualified voters.

In *Wadsworth* vs. *Supervisors*, 102 U. S., 534, where the doctrines laid down in the Aspinwall Case were reaffirmed, it was found that before the repeal of the enabling Act the bonds sued on had not been issued. As the Court say at page 540:

> "But we have seen that the bonds had not, in fact, been "executed when the power to issue and deliver them was "withdrawn by the Legislature."

Grenada Co. Supervisors vs. *Brogden*, 112 U. S., 271, which is also cited, was a case of *legislative* ratification.

Fourth Point.—*The transactions between the County Court and the Paducah and Gulf Railroad Company, as represented by the plaintiff, in October,* 1871, *in reliance upon which transactions that Company was consolidated with the Mississippi River Railroad Company, and the bonds of the latter Company, now in suit, subsequently purchased by the plaintiff, estop the County from questioning the validity of the bonds in his hands.*

(*a.*) The case is distinguishable from the Tipton County Case only in the nature of the alleged defect to be cured by *estoppel*. There, the defect was alleged fraud, bribery and corruption in the County Court, the authorized agent of the County by whom the subscription was made and the bonds issued. Here, the only possible defect is, that the act which was done in the name of the County, and on its behalf, and which it was fully authorized to do, is alleged to have been done by a different agent from the one designated by the Legislature. So far as the *Company* was concerned, the contract had, as in the Tipton County Case, been completely executed, and the County, here as there, was and still is in the actual possession and enjoyment of the stock subscribed for. The facts to *feed the estoppel* are also identical in each case, and they naturally would be, for the object in view was the same, and the method by which alone it could be gained was the same, namely, to fasten upon the County, through its legal representative, the County Court, a waiver of any possible defense which it might have, growing out of an alleged irregularity in the issue of certain negotiable paper which it had in each case been authorized to issue, *and which the plaintiff on the strength of the promise made by the County subsequently purchased* (pp. 73–75).

In their leading and essential features, the two cases are on all-fours. The only difference is that in the case at bar, the bonds, instead of being issued by the agent *originally* designated by the Legislature, who, it is contended, was the only agent that could law-

fully make the issue, were, on the contrary, issued by an alleged wrong agent, namely, the Board of Commissioners, who had, nevertheless, at the time of making the issue, if not actual authority, at all events, *color of authority under an Act of the same Legislature.*

This difference, we submit, is not, and cannot be, regarded as material, and we therefore call attention to what is said by this Court in the *Tipton County* Case, 103 U. S., at pp. 538–539, as being applicable to the case at bar, and decisive upon the question of *estoppel* which we here raise against the Defendant in Error:

> "The acceptance by the County Court of the terms and "conditions set forth in the proposition of September 30, "1871, and its participation, under the circumstances ad- "verted to, by its *authorized representatives*, in the proceed- "ings which resulted in the consolidation, whereby the "situation of the Paducah and Gulf Railroad became mate- "rially altered, *was, in effect, a representation to those interested* "*in that company that the County would not withhold payment* "*of its bonds or coupons, but would meet them according to the* "*terms of the* NEW AGREEMENT. By its conduct, it induced "those interested in the Paducah and Gulf Railroad Com- "pany—*then solvent, out of debt, and owning and operating a* "*complete railroad from Paducah, Ky., to Troy, Tenn., worth* "$1,000,000—to believe that the bonds would constitute a "part of the available assets of the new company. The de- "fendants in error received a portion of these bonds as "early as March 15, 1873. The integrity of the business "transaction by which they acquired them is not questioned by "any evidence recited in the record. Nor does it appear that "any evidence was offered that impugned in any degree the "good faith, in respect of these matters, of those who con- "trolled the Paducah and Gulf Railroad Company, or of "those who controlled the Paducah and Memphis Railroad "Company subsequent to the consolidation of 1872. The "defendants in error obtained the bonds in suit from the "Paducah and Memphis Railroad Company, paying value "therefor, and so far as the record discloses, without any "reason to suspect their payment would be resisted by the "County. *In view, then, of the conduct throughout all these* "*proceedings of those who represented the County of Tipton, it* "*is estopped by every consideration of law, justice and fair* "*dealing from disputing its liability to defendants in error* "*upon the bonds in suit.*"

If in the foregoing citation from the opinion in the Tipton County Case we read Plaintiff in Error for Defendants in Error, and Shelby for Tipton, the opinion meets precisely the facts disclosed by the record in the present case (pp. 71–81).

(*b.*) Irrespective of the question of original authority in the *County* to make the subscription and issue the bonds, and assuming for the sake of argument, and contrary to what we believe to be the true construction of the Act of February 25, 1867, by which the *power* to subscribe, &c., was originally authorized, that the authority was delegated to, or could only be exercised by, the Justices of the Peace composing the County Court, the County is nevertheless *estopped* to question the validity of the bonds in suit, by reason of what took place between the plaintiff and the County Court itself, as the legal representative of the County, and authorized to act for it, with reference to the consolidation between the Paducah and Gulf Railroad Company and the Mississippi River Railroad Company.

In support of this view, we rely, in connection with the facts of the case, upon the following sections of the Code of Tennessee adopted in 1858, as conferring complete legislative authority upon the County Court to waive any defense to the bonds by the County as part of the consolidation arrangement:

> "§ 402. Every County is a corporation, and the Justices in "the County Court assembled *are the representatives of the* "*County and authorized to act for it.*"
>
> "§ 404. Each County may acquire and hold property for "County purposes, and make all *contracts necessary or ex-* "*pedient for the management, control and improvement* "*thereof*, and for the better exercise of its civil and political "powers may make any order for the disposition of its prop- "erty, and may do such other acts and exercise such other "powers as may be allowed by law."

Here, as will be observed, there is *express* authority to the Justices when assembled in the County Court, to act as the *representatives* of the County, and the County is in turn authorized to hold property for

County purposes, and to make all contracts necessary or *expedient* for the management, control and improvement of such property, and finally to make *any* order for the disposition thereof.

And it is equally clear that whatever the County could do under § 404, the Justices are under § 402 authorized to do for it, and in its name, as *the representatives of the County and authorized to act for it*, when assembled in the County Court.

And we submit that what the Justices assembled in the County Court of Shelby County did in October, 1871, when the plaintiff came before them with the proposition or offer on behalf of the Paducah Company to consolidate the two Railroads, provided only the bonds issued by the County to the Mississippi River Railroad Company, and then outstanding, be *paid*, was precisely *within* the power given by the Code to the Justices, as representing the *County*, to make all *contracts* deemed necessary or *expedient* in the management, control and disposition of *County* property.

The County of Shelby was the lawful owner and holder of $300,000 of the capital stock of the Mississippi River Railroad Company, which had then done but little work on its proposed line, none of which was completed, less than $150,000 having been spent thereon, and the only assets of the Company that were of any real value being the bonds issued by municipalities in payment of subscriptions for stock. Among such bonds, of course, were those issued by the County of Shelby. The stock which the County owned, and for which it had already paid in part, was therefore practically of little or no value, unless something should thereafter be done to insure the completion of the proposed Road.

In this situation of affairs, the plaintiff, on behalf of the Paducah Company, and as the President of that Company, says to the County, through its authorized representatives, assembled in County Court, I can and will effect a consolidation between this broken down Mississippi Company and the Paducah Road, which is

"*solvent, out of debt, and owning and operating a complete railroad from Paducah, Kentucky, to Troy, Tennessee, worth* $1,000,000" (Tipton County Case, 103 U. S., p. 539), and will build the Road through your County to Memphis, the building of which was the original purpose intended to be accomplished by the issue of your bonds, if you will waive any defense on the remnant of the outstanding bonds which you have issued to the Mississippi River Railroad Company. If you will agree to do that, then the consolidation shall take place, and you, of course, can thereafter come in and exchange your worthless stock for stock in the new concern.

And, what follows the plaintiff's offer?

The Justices assembled in the County Court, as *the representatives of the County and authorized to act for it*, at the very same meeting at which the offer of the plaintiff was submitted to them, and after due de liberation, vote the collection of the tax of fifteen cents on the hundred dollars to pay the subscription of the County to the capital stock of the Mississippi River Railroad Company (p. 41), and ratify the previous levies by the Commissioners for the same purposes; and the plaintiff is further assured by many members of the Court, that the whole of the bonds will be paid (p. 72).

Upon this assurance being received, the consolidation takes place; the Defendant in Error exchanges its practically worthless stock for stock of the new Company, which it has ever since held and enjoyed; the new Road is "*completed through the whole of Shelby County*," and since July, 1873, trains have been running regularly between Covington and Memphis (75).

Here, we submit, are all the elements of a *contract* between the plaintiff and the Defendant in Error, and a contract which, so far as the Paducah Railroad Company is concerned, has been fully and faithfully performed. All that it promised to do it has done, and everything that it did, of which the County has had the full benefit, was done in reliance upon the promise and assurances of the Defendant in Error, through its legal and authorized representatives, that

the bonds would be paid; and the same is true of the plaintiff's purchase of the bonds in suit. The promise of the Defendant in Error, made for a good and valuable consideration, which it has received, and the fruits of which it still enjoys, was tantamount to a promise that no advantage would be taken of any defect or irregularity attending the original issue of the bonds, including even want of authority from the Legislature, if, in fact, there was such want of authority, which, of course, we deny.

The only possible question that can arise is as to the power of the County, through its representatives, the County Court, to make such a contract with the plaintiff. And of this we think there can be no doubt on any rational construction of the two sections of the Code of Tennessee above referred to. The stock in the Mississippi River Railroad Company then owned by the County was held, and had been acquired by it, for *County purposes*, within the meaning of § 404 of the Code, and the stock of the new Company received in exchange for the stock of the old was acquired and held for the same purpose, namely, to facilitate and promote the completion of a great public improvement, to wit, the building of a Railroad *into and through the County.*

In *County of Ray* vs. *Van Syckle*, 96 U. S., 675, the County Court of the County of Ray, in Missouri, was authorized by a statute, under which a subscription to the stock of a certain Railroad Company had been made, to "*take proper steps to protect the interests of the County.*"

Under this power, very slender it will be observed, as compared with the larger authority delegated to the Justices assembled in County Court, by the Code of Tennessee, it was held that the County Court of the County of Ray, could lawfully transfer the subscription to another Company, upon the latter agreeing to build substantially the same Road as the one for the construction of which the subscription was first made; and that the steps necessary to be taken in the case of a wholly new subscription could be omitted.

And the Court say, at page 686:

> "It is not an unreasonable construction of the statute to "say that, in determining what steps were proper for the "protection of the interests of the taxpayers, *the Court* had "authority to adopt such measures as prudent men managing "the affairs of others ought to have adopted. It evidently "regarded the arrangment made in 1868 as essential to the "protection of the County's interests, so far as they were in- "volved in the subscription of stock previously made, and in "the obligations thereby assumed. There is nothing in the "record upon which to base any imputation of collusion or "bad faith. The action was taken under such circumstances "of publicity as to notify the taxpayers generally of all that "was doing; and we are not prepared to say that the Court "had not the power to transfer the subscription from the "North Missouri Railroad Company to the St. Louis and "St. Joseph Railroad Company, and deliver the County "bonds to the latter, *upon its agreement* to build substan- "tially the same road, for the construction of which the "original subscription had been made."

If, as was here held, the County of Ray could transfer a subscription, in pursuance of authority to "*take proper steps to protect the interests of the County*," very clearly, in the case at bar, the County Court of Shelby County, which was authorized to act for the County, could make the contract it did in behalf of the County.

The Legislative authority conveyed to the County by Sections 402 and 404 of the Code, over the affairs and property of the County, is of the broadest and most comprehensive kind. It is not easy to say what the County could not do by means of that authority. But, certainly, it would seem clear that, finding itself the owner of the stock for which it had then already paid $100,000 of the principal of the bonds, and all the interest that had accrued on the whole issue up to that time, the County Court, as its representative, had, under those Sections, complete legislative authority "to act for the County in saving that property," and to make any reasonable contract or arrangement that would save and improve it "as property of the County." What was here done was declared by the

Court in the Tipton County case to be "*a new agreement*," and for the making of this agreement the County and the County Court had complete Legislative authority. So that even if the Court should be constrained to hold that the bonds were issued originally without Legislative authority, there was no lack of such authority for the arrangement made in October, 1871, as a part of which any defense to the portion of the bonds then outstanding was waived by the County, and in this respect the case before the Court is wholly distinct from cases like *Hayes* vs. *Holly Springs*, 114 U. S., 120, in which it has been held that no mere acts *in pais*, not supported by new Legislative authority, can work a ratification or *estoppel* as to municipal bonds originally issued without it.

And the plaintiff having changed his position and parted with value, on the faith of the promise and undertaking made by the defendant, the latter cannot now be heard to say, when it is impossible to place the parties *in statu quo*, that the bonds are invalid by reason of any defect or irregularity in their original issue. A case is presented of an *estoppel by contract*. And as was said in the Tipton County case, where the facts were precisely the same:

> "In view, then, of the conduct throughout all these pro-
> "ceedings of those who represented the County of Tipton
> "(*Shelby*), it is estopped, by every consideration of law, jus-
> "tice and fair dealing, from disputing its liability to Defend-
> "ants in Error (*Plaintiff in Error*) upon the bonds in suit."

It will also not be forgotten that the Court in that case found support for its decision in § 402 of the Code of Tennessee.

Fifth Point.—*The decisions of the Supreme Court of Tennessee, declaring the Act of March 9, 1867, establishing a Board of Commissioners for Shelby County, unconstitutional and void, are not binding upon this Court, which is entitled to Examine the question* DE NOVO; *and the Act itself was Constitutional.*

(*a.*) The only cases in which the Act of March 9, 1867, establishing a Board of Commissioners for the County of Shelby, has been held unconstitutional, are those of *Shelby County* vs. *Butterworth*, and *Walker* vs. *Merriman*. Each of these cases, however, as we have already shown, is based upon the decision in *Pope* vs. *Phifer*, 3 Heisk., 682, where a similar Act, establishing Commissioners for the Counties of Madison and White, was held unconstitutional. Hence, the only question to be determined is whether *Pope* vs. *Phifer* is such a decision as will preclude this Court from examining and determining for *itself* the question as to the constitutionality of the Act of March 9th, 1867.

Upon this question the Plaintiff in Error claims that this Court is absolutely free and untrammeled both in view of prior and subsequent conflicting decisions of the Supreme Court of Tennessee, touching *one* of the grounds upon which the supposed unconstitutionality of the Act considered in *Pope* vs. *Phifer* was based, and by reason of the peculiar and exceptional circumstances under which the case was finally disposed of.

As already explained in our FIRST POINT, the case decided that the Act establishing Commissioners for the Counties of Madison and White, which Act was similar to the one establishing such Commissioners for the County of Shelby, was repugnant to the Constitution of 1834, on these two grounds:

First.—That the Act was unconstitutional and void in attempting to reorganize an ancient institution of the State, recognized as such by the Constitution of 1834, known as the Quarterly Court of the County, by installing within it as Justices of the Court, in the

place of the Justices of the Peace of the County a Board of Commissioners upon whom were to be conferred all the powers of said Quarterly Court, together with certain additional powers.

Second.—That the Act was unconstitutional and void, because in the nature of special legislation, and therefore forbidden by section 7 of Article II. of the Constitution, which provides:

> "The Legislature shall have no power to suspend any "general law for the benefit of any particular individual; "nor to pass any law for the benefit of individuals incon- "sistent with the general laws of the land, &c.

At the time this case was decided by the Supreme Court of Tennessee, to wit, February 22, 1871, the bonds in suit had already been issued and outstanding for nearly two years, having been issued on March 1, 1869 (p. 4), and at the time of their issue there had been no decision by the Supreme Court, or by any inferior court of the State, adverse to the constitutionality of the Act of March 9, 1867—in pursuance of which the bonds on their face purport to have been issued—or the similar Act for the Counties of Madison and White. On the contrary, the constitutionality of each Act had in the lower Courts been sustained in its entirety, the former by the Chancellor having jurisdiction in the case of *Walker* vs. *Merriman*, where the question was directly in issue, and the latter by the Chancellor having jurisdiction in this very case of *Pope* vs. *Phifer*, his decree being subsequently reversed by the Supreme Court, on February 22, 1871, as already indicated.

The bonds then having been issued *before* the constitutionality of the Act of March 9, 1867, under which the issue was made, had been passed upon by the highest Court of the State, its *subsequent* decisions in the case of *Pope* vs. *Phifer*, and the cases which were a sequel to that case, are not binding upon this Court, and this Court will not follow those decisions, unless upon examination it shall find them correct.

Upon this question the present case is clearly within the ruling of this Court in the recent case of *Anderson* vs. *Santa Anna*, 116 U. S., 356, in which it was held that *when negotiable evidences of indebtedness of a municipal corporation in a State are created and issued under laws which have not, at the time of issue, been construed by the highest Court of the State, its subsequent construction of them is not conclusive on the Federal Courts, and the latter, although leaning to an agreement with the State Court, must determine the question upon their own independent judgment.*

But aside from the fact, that the case of *Pope* vs. *Phifer* was not finally decided until nearly two years after the bonds in suit were issued, there are other circumstances equally fatal to the case, when it is proposed to introduce it as an authority which this Court is either bound to follow, or should even be inclined to follow, as an authoritative exposition of its own laws or constitution by the highest Court of a State.

Over a year before the case was decided, namely, on January 27, 1870, *all* Acts creating Boards of Commissioners for Counties had been expressly repealed, and the former laws revived, and so there was in reality nothing for the Court to pass upon or decide, more than for the judges thereof to say that in their opinion a certain repealed Act was repugnant to the Constitution of 1834, which had itself already been supplanted by the Constitution of 1870. There was no real or substantial issue or controversy before the Court, and the decree pronounced was absolutely nugatory, so far as concerns the relief prayed for by the bill.

But more fatal even than these circumstances is the fact, that so far as the case was decided upon the *Second* of the two grounds above referred to, to the effect that the Act of March 9, 1867, was in the nature of special legislation—and this Court upon examination will find that the case is based quite as much upon the *Second* ground as upon the *First*—to that extent we say, it is clearly in conflict and at variance with the decisions and reasoning of the *same* Court in

the prior cases of *Moore* vs. *The State*, 5 Sneed, 512, and *Wilcox* vs. *The State*, 3 Heisk, 110, and the subsequent case of *Halsey* vs. *Gaines*, 2 B. J. Lea, 319.

And in view of this fact we submit that the case of *Pope* vs. *Phifer* is not entitled to the slightest consideration by this Court, in so far as it professes to decide —as it does decide—that the Legislature of Tennessee could not establish a Board of Commissioners, or *inferior Court*, for *one* County unless for all, under Section 1 of Article 6 of the Constitution of 1834, which provides as follows :

> "The judicial power of this State shall be vested in one "Supreme Court; in such *Inferior Courts* as the Legislature "shall from time to time ordain and establish, and the judges "thereof, and in justices of the Peace. The Legislature may "also vest such jurisdiction as may be deemed necessary in "corporation Courts."

In *Moore* vs. *The State*, it was decided that the Act of 1858, ch. 38, creating the office of County Judge for certain Counties of the State, was not a partial law within the meaning of the State Constitution, and therefore not repugnant to that instrument. And *Caruthers, J.*, in delivering the opinion of the Court, says, at pp. 512, 513:

> "It is contended that the Act of February, 1858, violates "the 7th Section of Article II. of the Constitution against par- "tial legislation, as it is limited to a few counties, and has "not a general and equal application to the whole State. "We think the Act is not obnoxious to this objection. The "policy of marring the uniformity and symmetry of a gen- "eral system, by the establishment of these local Courts, may "well be questioned, *but that the power to do so abides in the* "*Legislature we cannot doubt.* They have exercised it in es- "tablishing a criminal, as well as a Common Law and "Chancery Court at Memphis; at Nashville a Criminal "Court; a Common Law Court in Chattanooga, and perhaps "in other instances. The constitutionality of these Acts has "never, as we are aware, been questioned, although they have "exercised jurisdiction of the lives and fortunes of individuals. "Such Acts are not partial in the sense of the clause referred "to. The office created is open to all the citizens equally, in

> " the prescribed limits, and the jurisdiction conferred oper-
> " ates on all alike who may fall within its range. That pro-
> " vision, it is presumed, only has reference to Acts conferring
> " privileges and benefits, affecting rights or imposing penal-
> " ties. *It is with the Legislature to determine how many and*
> " *what kind of Courts are required for the administration of*
> " *justice, and what shall be the character and limits of the juris-*
> " *diction of each.* They may likewise christen the presiding
> " officer with any name or title they may consider most ap-
> " propriate. They might have denominated the officer in
> " question a chairman, a chief squire, a president or presid-
> " ing officer, as well as judge. They could not affect the
> " validity of the Act by which he was brought into existence,
> " or the extent of his jurisdiction."

So, in *Wilcox* vs. *The State*, decided only a week before the case of *Pope* vs. *Phifer*, it was held that the Act of 1870, chap. 115, "*To establish a Criminal Court for the County of Montgomery*," was Constitutional, and the Court dispose of the question in the following terms clearly applicable to the case at bar:

> " We are unable to perceive that the Act of July 6, 1870,
> " chap. 115, p. 175, is in conflict with the Constitution of
> " 1834 or 1870. Article 6, Sec. 1, of *each Constitution author-*
> " *izes the Legislature from time to time to ordain and establish*
> " *inferior Courts;* and we are not satisfied that the power to
> " establish a Criminal Court was not rightfully exercised in
> " this, as it had been previously in various similar cases "
> (citing *Moore* vs. *The State*).

In *Halsey* vs. *Gaines*, decided in 1879, the Court upheld the Constitutionality of an Act abolishing the *Second Circuit Court of Shelby County*, which was one of the system of inferior Courts to be established from time to time by the Legislature, in which the judicial power of the State was *expressly* vested by the Constitution of 1870. And at pages 318–319 the Court say:

> " We believe it is not denied that *previous* to the Constitu-
> " tion of 1870, the Legislature did possess the power to
> " abolish Circuit and Chancery Courts at pleasure. In fact,
> " the very Court in question was created by an Act of the 4th
> " of December, 1869, which abolished the system of Courts

"previously existing in Shelby County, and established in-
"stead two Circuit Courts, two Chancery Courts, and one
"Criminal Court, one of the Circuit Courts being the one
"now in controversy. * * * This was by no means the
"only instance in which the Legislature exercised the power
"of establishing and abolishing Courts as the public neces-
"sity demands under the Constitution of 1834. * * *
"Now, the only difference in these parts of the Constitution
"of 1834 and 1870, in reference to the *creating* of Courts, is
"this: By the Constitution of 1834, 'The judicial power of
"the State was vested in one Supreme Court, *in such inferior*
"*Courts as the Legislature may from time to time ordain and es-*
"*tablish and in the judges thereof*' [and in Justices of the Peace].
"By the Constitution of 1870, 'The judicial power of this
"State is vested in one Supreme Court, and in such *Circuit,*
"*Chancery,* and other inferior Courts as the Legislature shall
"from time to time ordain and establish, and in the Judges
"thereof' [and in Justices of the Peace].

"The difference is that in the Constitution of 1870, 'Cir-
"cuit and Chancery Courts' are *expressly* named as some of
"the inferior Courts that the Legislature may from time to
"time ordain and establish. It will be borne in mind that
"there is no clause in either Constitution, in terms or by im-
"plication, prohibiting the Legislature from abolishing *any*
"of the inferior Courts after they have been once estab-
"lished.

"*We have seen that, under the Constitution of* 1834, *it was left*
"*to the Legislature to determine how many inferior Courts were*
"*necessary to meet the public demand, and to ordain and estab-*
"*lish them accordingly, and in so doing to abolish Courts pre-*
"*viously existing and substitute others in their place, and neces-*
"*sarily to increase and diminish the number at pleasure.*"

And then the Court proceed to lay down as the law of the case that, even under the Constitution of 1870, which *expressly* named Circuit and Chancery Courts as some of the inferior Courts to be thereafter established, the Legislature might abolish at pleasure a Circuit Court which it had previously created in pursuance of the authority conferred upon it by that Constitution, and that the only possible restriction upon its power in that regard, was that the *system* of Circuit Courts, so expressly provided for by the Constitution, be not entirely abolished. But so far as concerns the Constitution of 1834, now in controversy,

the case recognizes very clearly the principle laid down in the earlier cases of *Moore* vs. *The State* and *Wilcox* vs. *The State*, that under *that* Constitution (*Section* 1, *Article* 6) the Legislature had full and ample power, as we here claim it had, to create and abolish systems of inferior Courts, *ad libitum*, and that the exercise of its power in that regard in different ways in different Counties is not in any way repugnant to Section 7 of Article II. of the same Constitution, which prohibited special legislation.

The cases of *Moore* vs. *The State*, *Wilcox* vs. *The State*, and *Halsey* vs. *Gaines*, are therefore wholly at variance with the *Second* ground of the decision in *Pope* vs. *Phifer*, to the effect that the Legislature could not create an *inferior Court* to be known as a Board of Commissioners for one County unless for all.

And in view of this conflict in the decisions and reasoning of the Supreme Court of Tennessee upon one of the questions considered in *Pope* vs. *Phifer*, and for the other reasons previously urged, we submit that this Court can and must proceed to consider in its entirety the constitutionality of the Act of March 9, 1867, creating for the County of Shelby a Board of Commissioners to take the place and perform the duties of the County Court.

(*b.*) Assuming that this Court will consider and decide for itself the constitutionality of the Act of March 9, 1867, we claim that the Act was in no way repugnant to the Constitution of 1834, but that on the contrary, it was entirely within the legislative authority *expressly* delegated by that Constitution.

That the Act was not as decided in *Pope* vs. *Phifer*, open to the objection of special or partial legislation, has already been sufficiently demonstrated by the citations from the earlier cases of *Moore* vs. *The State* and *Wilcox* vs. *The State*, and the subsequent case of *Halsey* vs. *Gaines*, all of which were decided by the same Court.

The only remaining question is whether the county courts were so fixed and established by the Constitution of 1834, that the Legislature could not reorganize them, or substitute other inferior courts in their place. And this question depends upon the proper construction to be placed upon Section 1, of Article 6 of that Constitution, which provides for the judicial power of the State, as follows:

> "The judicial power of this State shall be vested in one "Supreme Court; in such Inferior Courts as the Legisla- "ture shall from time to time ordain and establish, and the "judges thereof; and in justices of the peace. The Legis- "lature may also vest such jurisdiction as may be deemed "necessary in corporation Courts."

Here, there is no mention of a County Court, nor will any be found throughout the entire Constitution of 1834. The *prior* Constitution of 1796 did *expressly* refer to the *County Court*, and apparently recognized it as one of the then existing institutions of the State. But when the Constitution of 1834 was adopted, every allusion to or mention of a *County Court* is dropped, and therefore *necessarily*, as we claim, all recognition of it as thereafter to be a *Constitutional Court* of the State, which, like the *one Supreme Court*, referred to in Section 1 of Article 6, the Legislature could not abolish. If the *County Court* was a *Constitutional Court* of the State under the Constitution of 1796, certainly there could be no plainer or more positive way of abolishing its recognition for the future, as such, than by failing, *intentionally, it must be presumed*, to make any mention of it in the new Constitution of 1834.

And what happened subsequent to the adoption of that Constitution tends further to enforce this conclusion. The Legislature of Tennessee, on December 3d, 1835 (Public Acts of Tenn., 1835-6, Chap. VI., page 45), proceeded to pass an Act entitled:

> "*An Act to reorganize the County Courts in this State:*

And by Section 1 of the Act, it is enacted:

> "That hereafter there shall be established a Court in each "and every County in this State, to be held by the Justices "of the Peace thereof, in the Court Houses of the respective "*Counties* * * * to be called the *County Court*, &c.

And then by Section 3 of the same Act, the said Court, with *certain specified exceptions*, is given "jurisdiction of all matters of which they have jurisdiction by the laws now in force"—that is to say, the laws passed with reference to the County Court as it had *previously* existed under the Constitution of 1796.

As will be observed, the old County Courts are by this Act to be *reorganized*, and a County Court is *to be established* in each and every County of the State —which is very far from saying that such Courts were actually in existence as Constitutional Courts prior to the passage of the Act which called them into being under the new Constitution. What the Legislature did by this Act was to establish one of the "*Inferior Courts*," which Section 1 of Article 6 of the Constitution authorized it to establish. For, if the County Courts were continued in existence as Constitutional Courts by the Constitution of 1834, there certainly was no necessity for the Act of December 3, 1835, enacting that they should thereafter *be* established, and limiting and defining their jurisdiction.

The whole argument on behalf of the Defendant in Error, and of the Court in *Pope* vs. *Phifer*, in support of the theory, that the County Courts were recognized and continued in existence as *Constitutional Courts* by the Constitution of 1834, is based upon the fact that certain county officers, as for example, a Coroner and a Ranger, who, under the Constitution of 1796, were appointed by the *County Court*, are, by the Constitution of 1834, to be appointed by the *Justices of the Peace*, who had previously constituted the *County Court*. And therefore it is claimed that when *Justices of the Peace* are mentioned in the Constitution of 1834, what was really

intended was the old *County Court*, composed of said Justices, although, of course, it would have been quite as easy and far more natural to have used the words *County Court*, if it had been the intention to continue the alleged constitutional existence of that "ancient institution," instead of leaving it, as certainly was done, a subject for future legislation, under Section 1 of Article 6 of the Constitution, giving the Legislature the power to establish such "*Inferior Courts*" as might thereafter be deemed necessary. *Non constat*, but that the old County Courts, as organized, might prove a cumbrous relic of the past, and be it for the best interests of the State to reorganize them by substituting Commissioners for Justices of the Peace to discharge their functions. A part of their former jurisdiction was taken away by Section 3 of the Act of December 3, 1835; and what, as we think, was clearly intended by the framers of the Constitution of 1834 was to leave the existence or non-existence of the County Courts, and the whole question of their organization, to the people, acting through their chosen delegates, and not to fasten upon the State a tribunal which only an amendment to the Constitution could abolish or reorganize.

If then, the County Courts were not *Constitutional* Courts under the Constitution of 1834, but merely "*Inferior Courts*," existing at the will and pleasure of the Legislature, then it was clearly competent for the Legislature, under Section 1 of Article 6 of the Constitution, to reorganize them, and to substitute Commissioners in the place of Justices of the Peace, as Judges therein to discharge their functions and powers, as was done by the Act of March 9, 1867.

That Act, we therefore submit, was Constitutional throughout, and accordingly that the bonds issued by the Commissioners were valid and binding obligations upon the County of Shelby.

For a fuller discussion of this point, we refer to the able Brief of Messrs. Poston, for the Plaintiff in Error.

Sixth Point.—*The judgment rendered below should be reversed, and a new trial ordered.*

JOSEPH H. CHOATE,
Of Counsel.

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118-425

No 194

IN THE SUPREME COURT OF THE UNITED STATES.

Error to Circuit Court for the Western District of Tennessee.

EXTEIN NORTON vs. SHELBY COUNTY.

JULIUS A. TAYLOR, of Taylor & Carroll,
Of Counsel for Shelby County.

IN THE SUPREME COURT OF THE UNITED STATES.

—o—

EXTEIN NORTON
vs.
SHELBY COUNTY.

Error to Circuit Court for Western District of Tennessee.

On the 27th October, 1880, the plaintiff, claiming to be an innocent purchaser, sued the defendant to recover upon twenty-nine (29) bonds of $1,000 each, and three (3) detached coupons of $60 each, issued to, and in aid of the Mississippi River Railroad Company, by certain persons, claiming then to have the authority to issue bonds, as the county commissioners of Shelby county, Tennessee, under and by virtue of the several acts of the general assembly of that state, which are referred to and designated on the bonds. To the plaintiff's declaration, four pleas of *non est factum* were interposed, and to those pleas, by leave of the court, five special replications were filed by the plaintiff, to each of which a special rejoinder was interposed, and thereon issue joined, by all of which two questions were raised for decision.

(1st) Whether the commissioners had power to issue the bonds; and

(2nd) If they did not, then whether their issue has been validated by the subsequent acts of the quarterly court.

The jury were charged to find for the defendant, so rendered
R., p. 19 | their verdict, and accordingly did the court award its judgment, to reverse which the plaintiff has sued out this writ of error.

The assignments of error are practically but two; the 1st is,

the court erred in holding the commissioners of Shelby county had no power to issue the bonds; and the

2nd. If mistaken in the first, then the quarterly court has, by the assurances of its members, and by voting the stock in the railroad, and levying taxes to pay the coupons and bonds as they matured, ratified the issue of the bonds, at least as to the plaintiff.

Considering the first, it is essential to the plaintiff that the bonds and coupons sued on should have been executed by persons authorized to execute them by the laws of Tennessee, for if there is a total want of authority to issue them, there can be no such thing as a bona fide holding.

Oatland vs Skinner, 94 U. S., 258.
Floyd Acceptances, 7 Wall., 666.

The power to issue is claimed to have been conferred by the twenty-fifth section of the act of 9th March, 1867, on the persons who did issue them, and by the provision as follows:

"And in addition to the powers now conferred by law the said Board "shall have authority * * to subscribe stock in railroads, which the "County Court of Shelby County has been authorized by general or special "law to subscribe, and under the same conditions and restrictions, and to "represent such stock in all elections for directors, and provide for the "payment of subscriptions as made."

If this provision otherwise would be a grant of the power claimed, then no authority was conferred by it, for the act of 9th March, 1867 (session acts 1867, page 66, Exhibit 1 to brief), has by a course of decision in Tennessee been held unconstitutional, (Page et als. vs Phifer et als., 8 Heisk., 683; State vs Peacock, Mss., 1871; Shelby County vs Butterworth, Mss., 1871; State Ex Rel vs Merriman et als., Mss., 1871; 8 Heisk., 22); and as this Court will administer the law in this case as it has been uniformly declared by the supreme court of Tennessee—(Olcott vs Supervisors, 16 Wallace, 678; Township vs Meary, 92 U. S., 289-484; Gelpcke vs Dubuque, 94 U. S., 220; County of Cass vs Johnson,

95 U. S., 360; Fairfield vs Gallatin, 100 U. S., 47; Roberts vs Bolles, 101 U. S., 119; Scipio vs Wright, 101 U. S., 665; Douglas vs County of Pike, 101 U. S., 678; Dixon vs Field, 111 U. S., 90; Grant vs Corness, 109 U. S., 104; Taylor vs Ypsilanti, 105 U. S., 71-294)—it will hold the enabling act relied on violative of the constitution of Tennessee, of which all persons dealing in bonds issued under it must take notice at their peril.

Ottawa vs Perkins, 94 U. S., 262.
Pendleton vs Amy, 13 Wallace, 294.
Kennicott vs Supervisors, 16 Wallace, 452.
St. Joseph vs. Rodgers, 16 Wallace, 644.
Coloma vs Eaus, 92 U. S., 484.

For the plaintiff it is argued there has been no uniformity in the decisions in Tennessee, and hence this court will decide the question of whether there was a want of power in the commissioners upon principle.

By the acts of the 25th February, 1867, and the 5th November, 1867, the power to make a county subscription was vested in the county court of any county through which the line of the Mississippi Railroad is proposed to run, when a majority of the justices in commission at the time concurred.

The county of Shelby did not have power to make a subscription, but its county court did for it, and while the legislature is omnipotent, except when the constitution imposes limitations, yet as it delegated the power of binding the counties of the state to their quasi local legislatures, created each county a corporation, gave the justices of the peace, in county court assembled, the power to act so as to bind the county, that is the only mode and the only tribunal or agency under the laws of Tennessee which could make a valid subscription of stock to the Mississippi River Railroad Company.

Code, 402.
Locomotive Works vs Tipton, 103 U. S.
Lauderdale County vs Ferguson, 7 Lea, 166.

State vs Anderson County, 8 Baxter, 258.
Winston vs R. R., 1 Baxter, 62.
Grant vs Lindsay, 11 Heisk., 664.

That the power existed in the justices of Shelby county, in county court assembled, a majority concurring, who were there in commission, to make a subscription non constat—that usurpers—five persons assuming authority, not colore officii, for there were no offices to fill, but under a void act, claiming the power to bind a county court, upon their unwarrantable assumption to act for it in the place of its legislative assembly, could defectively execute the power.

Kelly vs Milan, 7 A. and E. Cor. Cases, 317.

The want of power, says Judge Burroughs, in his work on public securities, page 367, may arise where the enabling act violates some prohibition of the constitution of the state, either applying to laws generally or having a special reference to municipal bonds. And this court, speaking through Mr. Justice Hunt, in the Township of East Oakland vs Skinner, 94 U. S., 258, said: "We have held there can be no bona fide holding where the state did not in law authorize the issue of the bonds." The objection goes to the point of power. There is an entire want of jurisdiction over the subject. It is not the case of an informality, an irregularity, fraud or excess of authority in an authorized agent. Where there is total want of authority there can be no such thing as a bona fide holding. The bonds in this case recite they were issued by authority conferred upon the county commissioners of Shelby county by section (25) twenty-five of an act passed 25th March, 1867, hence the warrant of their issuance was declared to the world to be found in that act. It was the source from which the power emanated, and if it is void, and there can be found no other statute giving the persons who issued the bonds the power to do so, then they have no power as agents of the county of Shelby to bind it.

This case, therefore, is governed by the principles of law announced as elementary by this court in 108 U. S., 287, and is

neither an informality, an irregularity, fraud or an excess of authority in an authorized agency in issuing bonds which could have been by it issued comformably to the law authorising it to issue them.

Norton was chargeable in law with notice of the want of power in the board of commissioners to bind the county of Shelby by issuing bonds as its binding negotiable obligations.

The only distinction that can be made between the case of Lewis vs Shreveport and this case is, that here the county court could exercise a power under chapter 192 of the acts of 1852 or the acts of 1867 and 1869, and the municipal authorities of Shreveport could not by any law of Louisiana. It seems to us the principle is the same, for the reason there is a want of power in the board of county commissioners in this case, and there was a want of power in the municipal authorities in the case cited. It will be observed that in the acts of 1867 the power to make the subscription to the stock of the Mississippi River Railroad is not given to the county of Shelby, but is given to its county court, and the power to issue bonds is given the county court making the subscription.

Thus the county court exclusively was vested with legislative authority to subscribe for the stock and issue the bonds of Shelby county.

The question of legislative authority is always open to enquiry against a bona fide holder, and if there is a want of power no legal liability can be created. 110 U. S., 619.

The power given the county court was never invoked. There was never an attempt to exercise it, not a solitary bond issued purporting to be by virtue of its grant, so that if this court administers the law according to the Tennessee decisions adjudging the act of the 9th of March, 1867, unconstitutional, the plaintiff is the owner of bonds issued without legislative authority.

Mr. Justice Freeman, speaking for the court in Pope vs Phifer,

"Held justices of the peace to be constitutional officers with powers con-
" ferred, and in their collective capacity to be exercised in county court."

Therefore the act creating county commissioners being but an attempt to displace the legal, constitutional legislature, for that reason was void, and also because it was not the law of land, being prohibited by section 8, act 1, of the declaration of rights, and of a general law under section 7, article 11.

There is not in Tennessee a case in conflict with this decision, consequently the county court could alone issue bonds.

Will this court follow the cases adjudged by the highest state courts?

In Gelpker vs Dubuque (1 Wallace, 206,) Mr. Justice Swayne, laying down the rule which this court adheres to, said:

"We are not unmindful of the importance of uniformity in the decisions of this court, and those of the highest local courts giving construction to the laws and constitutions of their own states. It is the settled rule of this court in such cases to follow the decisions of the state courts."

In Scipio vs Wright, Mr. Justice Strong, delivering the opinion of this court, said, on page 676, 101 U. S.: "It thus appears to be the settled construction given by the courts of New York to the act under which the bonds now in suit were issued, and to other similar acts, that they do not authorize an exchange of bonds for shares of capital stock of railroad companies, and that a purchaser who had notice at the time of his purchase that such disposition of the bonds had been made by the town officers or railroad commissioners, cannot recover in a suit brought upon them."

In Douglas vs the County of Pike, 101 U. S., 688, this court, speaking through the Chief Justice, said: "As a rule, we treat as final the construction which the highest court of a state has given a statute and govern ourselves accordingly, but when different constructions have been given to the same statute at different times, we have not felt ourselves bound to follow the latest decisions, if thereby contract rights which have accrued under earlier rulings would be injuriously affected."

The rule deducible from the cases seems to be that when there is a settled rule of construction of a state statute or constitution

in the state courts, which renders void municipal bonds, this court will follow the state courts.

Burroughs on Public Securities, 529.

Claiborne Co. vs. Brooks, 111 U. S., 406.

Are the decisions of the supreme court of Tennessee, which hold the act of 9th March, 1867, unconstitutional, sustainable upon principle?

The provisions of the constitution affecting the question are as follows:

"The judicial power of the state shall be vested * * * in jus-"tices of the peace.—Sec. 1, Art. VI. Justices of the peace shall be elected "for six years.—Sec. 15, Art VI. Should a vacancy occur subsequent to an "election in the office of sheriff, trustee or register, it shall be filled by the "justices. There shall be elected for each county, by the justices of the "peace, one coroner and one ranger."—Sec. 1, Art. VII.

"That no freeman shall be taken, or imprisoned, or disseized of his free-"hold, liberties, or privileges, or outlawed, or exiled, or in any manner de-"stroyed, or deprived of his life, liberty or property, but by the judgment "of his peers, or the law of the land." Sec. 8, Art. I.

DECLARATION OF RIGHTS.

"The legislature has no power to suspend any general law for the bene-"fit of any particular individual, nor to pass any law for the benefit of in-"dividuals, inconsistent with the general laws of the land; nor to pass any "law granting to any individuals rights, immunities or exemptions other "than as may be by the same law extended to any member of the com-"munity who may be able to bring himself within the provisions of such "law; provided, always, the legislature shall have power to grant such "charters of incorporation as they may deem expedient for the public "good." Sec. 7, Art. XI.

"The general assembly shall have power to authorize the several coun-"ties and incorporated towns in this state to impose taxes for county and "corporation purposes in such manner as shall be prescribed by law, and all "property shall be taxed according to its value, upon the principles estab-"lished in regard to state taxation."—Sec. 29, Art. II.

"The declaration of rights hereto prefixed is declared to be a part of the "constitution of this state, and shall never be violated on any pretense what-"ever; and to guard against transgression of the high powers we have dele-"gated, we declare that anything in the bill of rights contained is excepted "out of the general powers and shall forever remain inviolate."—Section 12, Art. XI.

1. The organic law of Tennessee limited the taxing power to the legislature, and likewise limited its delegation as to county taxes to the counties.

The supreme court of Tennessee, construing the 29th section of Article XI of the constitution, has uniformly held that the

legislature had no power to delegate the taxing power to other than counties or incorporated towns.

Luehrmann vs Taxing District, 2 Lea, 453.
Reese vs Commissioners
Waterhouse vs Supervisors, 8 Heisk., 857.
Marr vs Enloe, 1 Yer., 452.

On the 13th August, 1869, the county commissioners imposed or rather attempted to impose a tax of 20 cents on each $100 worth of real and personal property on account of the Mississippi River Railroad bonds.

Record, page 30.

It is enacted by the 25th section of the act of 9th March, 1867, "that all the powers and duties which are now vested in and performed by the quarterly court shall be vested in the board of commissioners; * * and said commissioners are hereby vested with all the powers which by the code of Tennessee have heretofore been vested in the county court, in the following sections of the code of this state, viz.: 4206, 4207, 4211, 4213, 4214 and 4215."

Section 4211 of the code thus reads: "They shall have power to lay any tax, from time to time, at any time they think proper, to build any court house, jail or public office for county purposes."

Section 4213 provides: "They may release double taxes when they have been increased, and correct errors in the tax list."

Code, 4190, provides: "A majority of all the magistrates of the county is required to levy a tax or appropriate money to an amount over $50."

Code, 4193 requires the county courts at the first term in every year to impose and provide for the collection of the tax for county purposes, and fix the rate thereof.

The levying of taxes is not a judicial, but a legislative act.

Clark vs Montague, 3 Lea, 276.
Bowdin vs Lockhart, 3 Baxter, 271.

And consequently, without shadow of turning, the act of 9th March, 1867, because it gave the taxing power to the board of commissioners, has always been adjudged void.

Mr. Justice McFarland, recently dead, one of the greatest judges that ever adorned that bench, through whom the supreme court spoke in its latest adjudication on the subject, said:

"That the law creating the board of county commissioners, so far, at "least, as it authorized said board to usurp the constitutional functions of "the county court, was in violation of the constitution and their acts with- "out authority of law, is a proposition not denied."

8 Heisk., 248.

In the case of Marr vs Enloe, 1 Yerger, 455, Mr. Justice Catron held, under the constitution of 1796, the taxing power was vested in the legislature, and could not be delegated to the counties. This decision produced the change made by the constitution of 1834, authorizing its delegation to counties and incorporated towns for local purposes.

The uniform construction put on this section by all departments of the government of Tennessee, the contemporaneous construction put on it by the general assembly, which convened to make laws to carry out this provision, was that it inhibited the power of the state legislature to give the power to tax the people of a county to a board of five persons appointed by the governor.

The designation of the local subdivisions of the state to which the legislature was authorized to delegate the power of taxation was intended to exclude its delegation to others, and this is made manifest by an examination of the proceedings of the constitutional convention of 1870, which show Mr. Seay offered an amendment to insert civil districts after the word counties, which failed, and accords with the decisions of the supreme court of Tennessee.

Lipscomb vs Dean, 1 Lea, 552.
Luehrmann's case, 2 Lea, 444.

2. It is next insisted for defendant the act of 9th March, 1867- is in conflict with the several provisions of sections 1 and 15, Article VI, and of section 2 of Article VII of the constitution, for the

reason it gives to the said board of commissioners the powers the constitution devolves on justices of the peace.

Section 8 of chapter 48, session acts 1817, enacted: "All elections for coroners and rangers shall take place on the second day of the term, as formerly; on which day it shall be the duty of all the justices of the peace of the county to attend for that purpose."

Immediately after the adoption of the constitution of 1834 the general assembly enacted "That a ranger should be elected for each county by the justices of the county court." Session act 1835, chapter 254.

It is argued for the plaintiff that, as section 1 of Article VII did not provide that the ranger and coroner shall be elected by the county court, but by the justices of the peace, it is subverting all canons of construction to interpret the section to mean the justices of the peace were to elect in county court assembled.

Chief Justice A. O. P. Nicholson, who spoke for the court in Shelby County vs Butterworth, and State ex rel Walker et als. vs Merriman, was a member of the constitutional convention of 1870, the provisions of which, in respect to justices, being identical with those contained in the constitution of 1834, and it is reasonable that he would be familiar with the constitutional provisions. He and his associates gave them the construction which had been placed on them from their adoption till now by all departments of the government of the state, viz: The devolution of certain duties upon justices of the peace by the constitution, to be exercised in county court assembled.

We are not considering the power of the legislature to create local courts; that is conceded; but the power to take from the local quasi legislatures the power given and duties devolved on them by the organic law.

The act of 9th March, 1867, section 26, enacted "That the magistrates of said county shall be and are hereby relieved from all further duties and obligations incident to their office as members of the quarterly court of said county," and thus attempted to, and, if the law is valid, did, deprive the magistrates of Shelby

county of all the duties and obligations imposed by law on them as its legal legislature.

This question is not discussed even arguendo in Halsey vs Gaines, in which it was conceded the legislature had power under the constitutions of 1796, 1834 and 1870 to create and abolish inferior courts, but it was argued under the latter constitution the judge was elected for eight years and held his office for that term, and could only be removed by impeachment, and this was the question decided.

3 The next objection is that the act is partial, operative alone in Shelby county, an attempt to create there, and only there, a governing agency (not a local court), legislative in its character, with all the powers which are exercised in any other county of the state, by justices in county court assembled.

The supreme court of Tennessee has adjudged the act, not the law of the land, because prohibited under section 7 of Article XI, and section 8 of Article I. With that court the plaintiff takes issue, and his counsel submits it is not sustainable upon principle. By the law of the land is meant that which hears before it condemns, and gives its benignant blessings alike to all and imposes its burdens alike upon all—a general public law, binding upon everybody.

3 Heisk., 701.

This law is limited to one county. 14 Lea, 520. It authorizes the governor to appoint the persons who are to compose the board of commissioners for that county; it gives the board all powers in that county which the quarterly courts of other counties of the state have, so that it imposes in the place of the local legislature of one county of the state a body of men not representative in character, with power to tax the people of that county and to legislate for them, whereby they can be deprived of their property and disseized of their privileges under an act which is limited to the one county. It occurs to us Judge Freeman's argument in Pope vs Phifer, 3 Heisk., is unanswerable. The decision certainly accords with the theory of the government and the adjudications of the state court and this court. The act even at-

tempts to deprive the chancery court of all jurisdiction to redress any grievance occasioned by the act, it suspends all the general laws for the benefit of the persons who may be appointed commissioners.

4. But it is argued that even if the act was void, then the board of county commissioners was a de facto court, and its acts those of de facto officers, and binding on the county of Shelby, under the cases of

Moore vs State, 5 Sneed, 514.
Blackburn vs State, 3 Head, 690.
Ward vs State, 2 Cold, 605.
Venable vs Curd, 2 Head, 582.
Pearce vs Hawkins, 2 Swan, 87.
Commonwealth vs McCombs, 56 Penn. St., 436.
Brown vs Laut, 37 Maine, 322.
Cocke vs Halsey, 16 Peters, 71.
McKinstrey vs Turner, 9 John, 135.
Buckhan vs Ruggles, 15 Mass., 173.
Carlton vs People, 10 Mich., 250.
People vs White, 24 Wenden, 520.
State vs Carroll, 12 Amer. L. R., 165.

These cases all hold that where the act done was colore officii the act is valid as to third parties and the public in a collateral proceeding. The distinction is, where the act is under color of office it is valid; when it is not, it is void, and such has been the holding of the supreme court of Tennessee.

Shelby County vs Butterworth, MSS.
Reese vs Commissioners, 6 Cold.
McLean vs State, 8 Heisk., 249.
Brown vs Elms, 10 Hum., 135.
Smith vs Ishinhour, 3 Col., 214.

There can be no de facto officer when no de jure office is provided for.

Carlton vs People, 10 Mich., 250.
Strange ex parte, 21 Ohio St., 610.
Hooper vs Goodwin, 48 Me., 791.

Therefore, when it is adjudged the act of 9th March is unconstitutional the official character of the board of commissioners is stripped from them, and the plaintiff has no warrant of law for the issuance of his bonds, and the members of said board are without color of office.

The state of Tennessee has passed no law creating a board of commissioners for Shelby county; no law imposing duties on them; no law abrogating the quarterly court; no law giving the powers hitherto vested in that court to the board of commissioners; "for what it cannot do it certainly, in contemplation of law, has not done."

Virginia Coupon Cases, 114 U. S., 288.

When a statute is adjudged unconstitutional it is as if it had never been, rights cannot be built up under it.

Cooley Const. Lim. 227.
Strong vs Daniel, 5 Ind. 348.
Astrum vs Hammond, 3 McLean 107.
Woolsey vs Bank, 6 McLean 142.
Detroit vs Martin, 34 Mich. 170.
Hoover vs Backhoof, 44 N. Y. 113.
Clark vs Miller, 54 N. Y. 528.
Simms vs Buler, 50 Ind. 341.
Meacher vs Stony Co., 5 Nevada 244.

II.

It is next insisted that the court below erroneously held that voting, and receiving the stock, levying taxes to pay the coupons and bonds as they matured, and the assurances of the county court given the plaintiff, were not a ratification by the defendant of the unauthorized act of the county commissioners.

If there had been a defective execution of a power to issue the bonds, they could be validated. 5 Wallace. But here there was no power to issue; the act under which they were issued was void; hence they are void ab initio—even in the hands of an innocent purchaser.

Marsh vs Fulton County, 10 Wallace, 676.
Loan Association vs Topeka, 20 Wallace, 655.
Thompson vs Perrine, 103 U. S., 806.
Harsman vs Bates County, 92 U. S., 569.
Ottawa vs Lary, 108 U. S., 110.
Lewis vs Shreveport, 108 U. S., 287.

On the 15th November, 1869, the quarterly court of Shelby

convened at its first session, after the act of 9th March, 1867, and assumed its legislative functions, statutory and constitutional, as the governing agency of Shelby county. Record, 31.

On the 11th April, 1870, the following entry appears of record: "Ordered by the county court of Shelby county that the following rates of taxation be and the same are hereby established for county purposes for the year A. D. 1870:

64 "General purposes, 20 cents on the $100 worth of taxable property.

"Mississippi River Railroad bonds, 20 cents on the $100 worth of taxable property.

"Coupon tax, 20 cents on the $100 worth of taxable property. Judgments for costs in various courts, 10 cents on the $100 worth of taxable property.

"Bridges, 10 cents on the $100 worth of taxable property.

"Privilege tax, one-half of state tax on all privileges taxed by the state. 5—194. Record, page 33."

And on the 16th of same month and year the following entry appears of record: "Ordered, that the tax heretofore levied on 11ththe inst. for coupons be, and the same shall read, as follows: Ten cents on each $100 worth of taxable property for the bonds to the Memphis and Ohio Railroad, and 10 cents for the bonds of the Mississippi River Railroad Company, to be collected in cash.

"Ordered, that the court do now adjourn to meet on the first Monday in July, A. D. 1870, at 9 o'clock a. m.

"Examined and approved.

"T. C. BLECKLEY, Chairman."

Record, page 34.

That court was the governing agency of Shelby county, and it had power under section 6 of chapter 47, 1867, a majority of the justices in commission assembled concurring, to make a corporate or county subscription to the capital stock of the Mississippi River Railroad when it ordered the collection of the tax on 16th April, 1870, for the constitution of 1870 did not take effect till May 5th, 1870.

The case cited from Tennessee for the plaintiff is in accord with all the cases, and if it and they were deemed in point this case would not be for determination here.

The distinction between a want of power and an irregularity

in the execution of a power, or the validating by legislative ratification, seems to be lost sight of.

The corporate ideality, and the governing agency of it, are distinct, and cannot be otherwise treated. The county court of Shelby county is not the county of Shelby; it is its governing agency, and its acts within the scope of its agency are the acts of the county of Shelby.

The constitution of Tennessee and the acts of the general assembly of the state prescribe, limit and define the powers of the county court to act for the county of Shelby. An informality, an irregularity or a fraud, even, of the agent may be ratified by the principal when the agent is acting for the principal.

In the Virginia coupon cases Mr. Justice Matthews, through whom this court spoke, said on page 290, 114 U. S.:

"In the discussion of such questions the distinction between the government of a state and the state is important, and should be observed. In common speech and common apprehension they are usually regarded as identical, and as ordinarily the acts of the government are the acts of the state, because within the limits of its delegation of power, the government of the state is generally confounded with the state itself, and often the former is meant when the latter is mentioned. The state itself is an ideal person, intangible, immovable, immutable. The government is an agent and within the sphere of its agency a perfect representative, but outside of that it is lawless usurpation."

And in Claiborne county vs Brooks Mr. Justice Bradley, through whom the court spoke, said on page 406, 111, U. S.:

"Our opinion is that mere political bodies constituted as counties, are for the purpose of local police and administration, and having the power of levying taxes to defray all public charges created, whether they are or are not formally invested with corporate capacity, have no power or authority to make and utter commercial paper of any kind, unless such power is expressly conferred on them by law or clearly implied from some other power expressly given, which cannot be fully exercised without it."

The question then is, was the power given the county court to ratify an unauthorized issue of bonds for the county by mere usurpers

Municipal corporations possess only such powers as are expressly granted or may be implied, because essential to carry into effect those which are expressly granted. (Ottawa vs Carey, 108 U. S., 110.) The county court of Shelby county has no

power granted it to ratify bonds issued without color of law. Indeed by the act of February 25, 1867, the concurrence of a majority of the justices in commission was a condition precedent to a lawful issue of bonds, and any issue which was not predicated upon such concurrence was void.

In the state vs Anderson county, 8 Baxter, 253, Mr. Justice Sneed said:

"Indeed the doctrine of ratification itself would be a legal panacea to all manner of mere irregularities and must be fatal to the defense, unless it can be shown that the issuance of the bonds was void ab initio."

In the case where this language was used the bonds were issued pursuant to an act passed in 1854. The preliminary proceedings had been taken under a different act, but the authority to issue was found both in the act of 1852, and the issue was expressly validated by the subsequent act of 1854, so that it was but an irregularity in the preliminary proceedings at most.

In the case now for consideration the bonds were issued under a void act, and, therefore, incapable of ratification, except by a valid ratifying act of the state, The power to ratify rests alone in the principal, who can give the original authority to act, and the ratio decidendi of the cases is, the legislature having the power to grant the authority in the first instance, may ratify and validate an unauthorized exercise of power by the government of a county or city. (New Orleans vs Clark, 95 U. S., 654; Supervisors vs Brogden, 112 U. S., 321.)

The correlative of the proposition must be true, that the government of a county cannot ratify an unauthorized act, because in the first instance it had no power to authorize the act or appoint an agent, the principle being delegatus non potest delegare.

The cases cited and relied on for the plaintiff are all where there was mere irregularity in the preliminary steps to the subscription with an issue of the bonds by the proper legal administration, of the township, municipality or county.

8 Bax, 250.
5 Wallace, 772.
13 Wallace, 297.
6 Otto, 687.

The case from 13 Wallace was reversed for error in the trial judge in sustaining the demurrers to the defendant pleas.

The case of the county of May vs Vansycle was a valid subscription, under the constitution and laws of Missouri, to the North Missouri Railroad Company, transferred by the St. Louis and St. Joseph Railroad by a valid agreement of the county officials, the latter road being, to all intents and purposes, the former road, and that was the pivotal point upon which the case was ruled. It was not the case of a subscription to a distinct railroad company, but the transfer of a valid subscription already made, which the constitutional provision did not prohibit. (See Justice Harlan's opinion, pp. 184–5–6.)

No case has been ruled in this court holding that the power conferred upon the legislative agency of a county to subscribe for stock and in payment thereof issue bonds to a railroad, is the grant of authority to ratify the issue of such bonds by mere usurpers. The agency is not the principal and its acts are binding on the principal when warranted by the constitution and laws giving it authority to act for the principal. It would be an anomaly if the agent could act only when and as authorized by the constitution and laws, and could ratify the act of usurpers by the levy of a tax to pay the void bonds and coupons which these usurpers issued, they showing on their face to have been so issued. It would lead to frauds innumerable; it would be giving the power to bind the people by circumlocution and not by law; it would substitute a tax levy for the valid execution of a granted power; it would ubstitute a majority of the justices who voted the tax for the majority of the justices in commission, and thus require a less number to validate an usurpation than could originally act in the premises for the principal.

On Saturday, April 16, 1870, the quarterly court of Shelby county, Tenn., met pursuant to adjournment. Present and presiding, Esquire Thomas C. Bleckley, chairman; also present, Esquires Kiernan, Myhatt, Jones, Walton, Black, Hall, Moore, Swan, Miller, Glisson and Goodlett, associate justices; also pres-

ent, C. W, Lyman, deputy clerk, and A. P. Curry, acting as sheriff, when the following proceedings were had:

On the 21th of April, 1870, 18 justices voted for the tax levy, as will appear on the record, page 34.

The justices in commission in Shelby county are two for each of its civil districts, eight for the city of Memphis, one for Raleigh, one for Bartlett, one for Germantown, making forty-five. (See sec. 1 of act of 9th March, 1867, on page —— and sec. 15, art. vi., constitution of 1834, pp. 82–83, brief of Messrs. Poston & Poston, and the court will take judicial knowledge that Shelby county was then snbdivided into seventeen civil districts.) So it required twenty-three (23) to vote a subscription in the execution of a granted power to validate a railroad subscription. Quoting Mr. Justice Clifford's language on pages 781–782–783, 5 Wallace:

"Ratification is inoperative if the party attempted to be charged was not "competent to make the contract in question when the same was made, nor "when the supposed acts of ratification were performed, or if the contract "was illegal, immoral or against public policy."

The plaintiff insists it is the law of this case, because (1st) in 1867 the county of Shelby could subscribe the stock and issue the bonds, and (2d), having that power, the tax levy of April, 1870, ratified their unauthorized issuance.

To the extent of its authority the county court can bind the people of Shelby county and the property subject to its regulation and governmental control, but beyond its powers its acts have no effect (108 U. S., 121–122), and consequently

"Corporate ratification without authority from the legislature cannot "make a municipal bond valid which was void when issued for want of "legislative power to make it." (110 U. S., 287.)

The law adjudged is plain enough. The difficulty always in its application, and consequently the superstructure of the plaintiff's case, rests on the assumption that the county of Shelby had power to issue bonds in 1869, when these in suit were issued, that, as we have seen, is a fallacy, but if we concede it had it does not follow it can ratify these bonds without authority from the legislature, for they were void when issued for want of legis-

lative power to make them, and carried full notice to every purchaser that they were couriers loaded down with invalidity.

"The idea implied in the ratification of a municipal act, performed with-
"out previous legislative authority, is that the ratifying communicates
"authority which relates back to and retrospectively vivifies and legalizes
' the act as if the power had been previously given."

Such a statute is of the same import as original authority. (Supervisors vs Grenada, 112 U. S., 321.)

This is purely legislative in its character and is exclusively within the province of that department of the government.

The issue of the bonds being an unauthorized act the county cannot ratify it.

People vs Flagg, 17 N. Y., 586.

Indeed the case cited on page 40 of the brief of Messrs. Poston & Poston, of McCracken vs City of San Francisco, 16 Cal., in which Judge Field says, on page 624:

"It follows, also, from the general doctrine that a ratification can only be
"made when the principal at the time possesses the power to do the act rati-
"fied. He must be able at the time to make the contracts to which, by his
"ratifications, he gives validity."

Is an authority against the ratification of unauthorized issue of the bonds.

The county of Shelby had no power to issue, through the board of commissioners, the bonds. When eighteen members of its county court voted the tax it was not able to make that contract.

We have argued the question of ratification upon the tax levy of April, 1870, 1st, because on the 5th of May ensuing the constitution of 1870 became the paramount law of Tennessee and section 29 of article 11 ordained as follows:

"But the credit of no county * * shall be given or loaned to, or in aid
"of any * * * corporation except upon an election first to be held by
"the qualified voters of such county and the assent of three-fourths of the
"votes cast at such election, nor shall any county * * become a stock-
"holder except upon a like election and the assent of a like majority."

Which was in terms a constitutional prohibition on the power of the legislature itself to validate the bonds issued by Barbour Lewis.

We are not considering a subscription previously made, but the illegal act of usurpers, which, it is argued, can be vitalized.

If the county of Shelby had made a subscription anterior to the constitution of 1870 of course that constitution did not affect it, but no subscription was made by any agent authorized to bind that county in this case and the pertinent question is, could the justices, a majority in commission concurring, after the 5th of May, 1870, execute the power granted by the 6th section of the act of 25th February, 1867.

In the case of Supervisors vs. Grenada, this court, speaking through Mr. Justice Harlan, said:

"While the legislature could not, after the adoption of the constitution of "1869, have legalized a municipal subscription, assented to by a less ma- "jority of legal voters than is prescribed in that instrument, its power by "retrospective enactment to confirm and legalize a municipal subscription "to the stock of a railroad corporation, to which the constitutional majority "of electors had assented at an election, of which due notice was given, "cannot, we think, be successfully disputed."

After the constitution of 1870 the county of Shelby could not, even with legislative sanction, make a valid subscription to the Mississippi Railroad unless three-fourths of the qualified voters assented thereto upon an election for the purpose of determining whether there should or should not be a subscription.

7 A. and E. Corp. cases, 335.

Since the case of Aspinwall vs Commissioners of the county of Daviess, 22 Howard, 381, decided in 1859, the law has been that neither the charter of the railroad authorizing it to receive, nor the vote of the electors authorizing a county to make a subscription, constitute a contract with the company until the subscription is actually made by the proper officers of the county, and that bonds issued after an amendment to the constitution of the state, made after the vote, and before the subscription, were void, because the new constitution forbade counties from loaning their credit, borrowing money to make and pay for a subscription to the stock of a railroad.

The distinction between the cases relied on by the plaintiff to sustain the proposition that the 29th section of Article 11 of the

constitution is but a limitation on the power of the legislature in the future, and this case is, that here the prohibition is not against delegation, but against the counties, and a direct inhibition against municipal action.

Burroughs, 458.

Aspinwall vs Supervisors is the leading case establishing the principle governing this case. The organic law of 1870 in terms prohibits not the legislature, but the counties. It says the credit of no county shall be given or loaned; nor shall any county become a stockholder.

In the examination we have made, aided very much by the industry of the counsel for the plaintiff, we find the following cases adjudged in this court holding that constitutions operate prospectively:

Missouri cases—

County of Callaway vs Foster, 93 U. S., 567.
County of Scotland vs Thomas, 94 U. S., 688.
County of Henry vs Nicolay, 95 U. S., 619.
County of Ray vs Vansyck, 96 U. S., 675.
County of Macon vs Sholes, 77 U. S., 99.
County of Schyler vs Thomas, 98 U. S., 166.

Mississippi case—

Supervisors vs Galbreath, 99 U. S., 214.

Missouri case—

County of Cass vs Gillett, 100 U. S., 585.

Illinois case—

Fairfield vs Gallatin, 100 U. S., 47–87.

Missouri case—

Louisiana vs Taylor, 105 U. S., 454.

Eight of the cases involved a construction of section 7 of Article II of the constitution of Missouri of 1865, which ordains as follows: The general assembly shall not authorize any county, city or town to become a stockholder in or loan its credit to any company, association or corporation, unless two-thirds of

the qualified voters of such county, city or town, at a regular or special election to be held therein, shall assent thereto.

One of the cases involved the construction of Article XIX of the constitution of Illinois, which reads thus: "No county, city, town or township, or other municipality, shall ever become subscriber to the capital stock of any railroad or private corporation, or make donation to or loan its credit in aid of such corporation; provided, however, that the adoption of this article shall not be construed as affecting the right of any such municipality to make such subscriptions, when the same have been authorized by existing laws, by a vote of the people and such municipality prior to such adoption."

The other case involved the construction of section 14 of Article XII of the constitution of Mississippi: "The legislature shall not authorize any county, city or town to become a stockholder in or to loan its credit to any company, association or corporation, unless two-thirds of the qualified voters of such county, city or town, at a regular election to be held therein, shall assent thereto."

The mere casual reader of two of these provisions will readily apprehend that they do not prohibit subscriptions by municipalities. Two of them prohibit the future delegation of authority to them by the legislature; the other excludes from its operations authority already given to them.

In Wadsworth vs Supervisors, 102 U. S., 534, the case of Aspinwall vs the County of Daviess was reaffirmed, and held to apply to that case, which was the performance of the conditions upon which was dependent the power to make a donation authorized by the voters of the county (EauClaire, Wisconsin), not carried out by the supervisors, the power given them to issue and deliver the bonds taken from them by an act passed after the railroad company had constructed its railway and was operating it.

In the case at bar there is no executed contract between the plaintiff and the defendant. The governing agency never subscribed for stock in the Mississippi River Railroad; never issued bonds to it; consequently, after the 5th of May, 1870, it never

could, except upon the assent of three-fourths of the voters of Shelby county, at an election to be held.

Therefore, as the county court could not bind the county of Shelby by issuing bonds without such assent, it was without power to ratify, for the rule is, an act ultra-vires beyond the power of the municipality cannot be by it validated by ratification.

It would not matter that the county court employed an agent to sell the bonds, levied taxes to pay them, gave assurances they were valid, the vice still adhered to them, was written upon them in indelible characters. 108 U. S., 287.

If there had been legislative ratification prior to 5th of May, 1870, the case at bar might be within the decision of this court, in Jonesboro City vs R. R., 110 U. S., 197; if afterwards, such legislation would be repugnant to the constitution of 1870, and void, for it cannot make good retrospectively acts which it has no power to pass.

Acts which cannot be justified under a power cannot be cured by legislative balm, and certainly not by eighteen of forty-five justices voting a void tax levy.

Cooley on Constitutional Limitations, 382.

III.

But it is said for the plaintiff the justices of the peace of Shelby county, in county court assembled, October term, 1871, levied a tax to pay the coupons and bonds issued to the Mississippi River Railroad, and many members of that court assured him the whole debt would be paid; that the effect produced on him satisfied him that there was no objection to the payment of the bonds, and they would be paid, and the consolidation was approved by the county court, and that afterwards the consolidation took place; he purchased the bonds, and the stock of Shelby county was voted for consolidation.

Record, pp. 72, 73, 74, 75.

The official proceedings of the court appear on the Record, page 41, and are as follows:

And on Thursday, October 5, 1871, one of the days of the October term, 1871, of said quarterly court—present, Esquire Thomas C. Bleckley, chairman, and Esquires Witherington, York, Ligon, Reynolds, Duncan, Giles, Hall, Spelman, Winters, Moncrief, Pulliam, Caldwell, Wallace, Brewer, Allen, Walker, Jones, Holman, Buntyn, Hoegel, Brown, Burke, Elliott, Moore, Miller, Glisson, Brooks, Massey, H. C., Massey, Jeremiah, and Stone—the following entry appears of record, to-wit:

Ordered, That the order of this court made at the July term, 1871, suspending the collection of the tax levied to pay the subscription of Shelby county to the capital stock of Mississippi River Railway Company be, and the same is hereby, rescinded, and the tax collector is hereby instructed to proceed with the collection of said tax of fifteen cents on the hundred dollars as already assessed, and that when collected the same shall be held subject to be paid over to the parties entitled to receive it on the order of the chairman of this court whenever he shall have satisfactory evidence that the work on the road from Memphis to the north line of Shelby county is under contract and in process of construction, the money to be paid out only on the estimates of the chief engineer of the work.

Ayes—Esquires York, Ligon, Reynolds, Duncan, Giles, Hall, Spelman, Winters, Moncrief, Pulliam, Caldwell, Wallace, Brewer, Hoegel, Brown, Burke, Elliott, Moore, Miller, Brooks, Massey, Jeremiah, and Stone—22.

Noes—Esquires Witherington, Allen, Walker, Jones, Holman, Buntyn and Glisson—7.

Entered Book G, page 7.

The argument made for its plaintiff now is, that, upon these facts, whether the bonds are valid obligations of the county of Shelby or not, is immaterial, because the action of the county court has precluded the county from setting up the defense that they were issued without power.

There is no analogy between the assurance of an individual that his obligation is valid and the assurance of "many members of the county court" that certain county bonds will be paid, made to one who enquires with a view of purchasing the obligation or the bonds, for the very obvious reason the individual acts for himself, and the members of the county court act only for the county within the sphere of a prescribed, defined and limited agency.

Therefore the cases cited in the brief involving estoppels in pais have no application in this case.

The cases cited from this court are Ritchie vs Franklin County, 22 Wallace, 467, and the County of Tipton vs Locomotive Works, 103 U. S., 523; and the principle of law adjudged in them, it is insisted, is conclusive here.

In the first named case "the acts of general assembly of Missouri of 1865 and 1866 gave authority to the county courts to borrow money and issue bonds for road purposes, where the amount of proposed expenditure had been submitted to a vote of the people." Bonds were by the county court of Franklin county, Mo., issued without a submission of the question to the people; and as it had been held in the case of the Leavenworth and Des Moines Railroad Company vs The County Court of Platte County, that the power conferred upon the county courts could not be exercised unless the proposed expenditure was approved by the voters, the legislature passed a curative act, general in its language and without reference to any particular county, and the question was whether or not the curative act was valid. It was adjudged to be valid.

If the case is an authority at all, it is against the plaintiff, because it is decisive of the questions: 1st, Where the authority to issue bonds is dependent upon a vote of the people, bonds issued without submitting the question to the people are void; and, 2d, That the mistaken exercise of power by the county court is curative by legislative confirmation only. Upon the second point adjudged, there never has been a doubt suggested. Where the legislature could grant original power it could ratify a defective execution of authority or validate by a confirmatory enactment an ultra vires act of the administrative agency of a municipality, if there is no constitutional inhibition.

New Orleans vs Clark, 95 U. S., 644.
Campbell vs Kenosha, 5 Wal., 194.
Beloit vs Morgan, 7 Wal., 619.
Thompson vs Perrine, 103 U. S., 806
Quincy vs Cooke, 107 U. S., 549.

Hayes vs Holly Springs, 114 U. S., 120.

Read vs Plattsmouth, 107 U. S., 577.

If such legislation be necessary to confirm an ultra vires corporate act in issuing bonds without legislative authority, it is a logical sequence that, without such an act, their invalidity may be shown, because everybody is chargeable with the vice of their issuance without power, and the want of authenticity is not curative by the municipality, which is but a mere local subdivision of government.

Hayes vs Holly Springs, 114 U. S., 126.

"Recital on the face of the bonds or acts in pais, operating by way of estoppel, may cure irregularities in the execution of a statutory power, but they cannot create it." Consequently there is no estoppel upon Shelby county, and it can show in this suit there was no legislative authority for the issuance of the bonds sued on.

The case of the County of Tipton vs Locomotive Works, 103 U.S., 538, involved two questions: 1st, Whether the acts of 25th Feb., 1867 (Exhibit 2 to brief), and of 12th February, 1869 (Exhibit 3 to brief), were constitutional; and, 2d, Whether fraud in the issuance of bonds under those acts could be set up in defense of the suit. It was ruled the acts were constitutional, and that the county was estopped to set up the fraud. That case was the execution of a granted power by the proper agency. The objection was its exercise was induced by bribery and fraud, hence invalid; but there was ratification and estoppel. Here the case is the want of legislative authority in the issuing body to create the bonds; incurable, no curative act, no attempt to cure by the county court, a tax levy, and the assurances of many members of the county court the whole debt would be paid. Legislative authority is wanting, and the bonds have no validity.

Hayes vs Holly Springs, 114 U. S., 126-7.

Julius A. Troy

Of Counsel for Shelby County.

EXHIBIT I.

SECTION 1. Be it enacted by the General Assembly of the State of Tennessee, That there shall be elected by the qualified voters of the city of Memphis, in the county of Shelby, eight justices of the peace for the said city, in addition to the number heretofore allowed by law, four of said justices to reside in the fifth and four in the fourteenth civil districts of said county Shel. by, in which is situated the said city of Memphis, said justices to be elected and commissioned as other justices in this state.

Sec. 2. Be it further enacted, That there shall be appointed by the judge of the county court of Shelby county three notary publics for the city of Memphis.

Sec. 3. Be it further enacted, That notaries public shall have the same power as justices of the peace of this state to administer oaths, to take depositions, to qualify parties to bills in chancery and to affidavits in all cases, and in all such cases the notaries' seal shall be affixed.

Sec. 4. Be it further enacted, That the town of Taylorsville, Johnson county, shall be entitled to one additional justice of the peace, to be elected by the qualified voters of the civil district in which said town is situated.

Sec. 5. Be it further enacted, That the eighth civil district in the county of Polk shall elect one additional justice of the peace, who shall reside at and keep his office in the town of Hiwassee, in said civil district, with all powers and privileges of other justices of the peace in said county.

Sec. 6. Be it further enacted, That the sheriff of Haywood county shall have the authority and power to appoint an additional deputy in Haywood county.

Sec. 7. Be it further enacted, That any justice of the peace elected in and for any county of this state who hereafter shall open an office for the trial of causes in any other civil district, city or ward than the one in and for which such justice shall have been elected, shall thereby vacate his office, and the sheriff, upon giving the usual notice required by law, shall proceed to elect a justice to fill such vacancy.

Sec. 8. Be it further enacted, That any justice of the peace in this state who, from and after the passage of this act, shall continue in any office that he may have opened out of the ——— civil district, city, corporation or ward, in and for which he may have been elected, and reside for the period of ten days, shall forfeit his office, and the sheriff shall at once proceed to fill the vacancy, proceeding as directed in the code of Tennessee, section 342.

Sec 9. Be it further enacted, That the charter of the city of Memphis be amended as follows: That all revenue arising to the city of Memphis from taxes on sales and privileges shall constitute a special fund, to be known as the metropolitan police fund, which shall be applied to the payment of the expenses of the metropolitan police force within said city and to no other purpose whatever, except as hereinafter provided.

Sec. 10. Be it further enacted, That said tax shall be collected by the city tax collector on privileges, who shall pay over to the financial commissioner of the metropolitan police, within the first five days of each month, the amount collected by him during the preceding month.

Sec. 11. Be it further enacted, That no appropriation for other purposes than to defray the expenses of the metropolitan police force shall be paid out of this fund. The tax collector shall not receive in payment of said taxes any warrant drawn by virtue of any appropriation by the board of aldermen, or for any indebtedness of the city of Memphis other than the expenses of the metropolitan police force.

Sec. 12. Be it further enacted, That all appropriations for police purposes shall be made by the board of police commis-

sioners, appointed by virtue of an act to establish a metropolitan police district and to provide for the government thereof. Passed May 14, 1866. Any warrant drawn by two or more of said commissioners, by virtue of said appropriation, shall be received by the tax collector in payment of said tax on privileges.

Sec. 13. Be it further enacted, That in case the board of mayor and aldermen neglect or refuse to levy the tax on sales and privileges authorized by law or shall fix the same at the less amount than the state tax on like sales and privileges, then the board of police commissioners are hereby authorized to levy such tax, which shall be collected in like manner as those levied by the board of mayor and aldermen.

Sec. 14. Be it further enacted, That in case the city tax collector neglects or refuses to collect the tax on privileges as provided for in this act, or neglects or refuses to pay over the amount collected to the financial commissioner of the metropolitan police board, as herein provided, then the board of police commissioners shall appoint a proper person to collect said taxes, who shall take the oath required by law and give such bond as may be required by the board of commissioners, not less than twenty-five thousand dollars nor more than fifty thousand dollars, and such person shall be entitled to the same compensation as is now allowed to the city tax collector on privileges.

Sec. 15. Be it further enacted, That the board of mayor and aldermen is authorized to increase the tax on tippling houses to two hundred and fifty dollars per annum, and in case of neglect or refusal to increase it to at least one hundred and fifty dollars per annum, then the board of police commissioners is hereby authorized to levy the said tax of not less than two hundred and fifty dollars, the same to be collected by the tax collector as in other cases.

Sec. 16. Be it further enacted, That any surplus remaining in the hands of the police commissioners after defraying the expenses of the police, including the amount advanced by the state and other indebtedness already incurred, shall be reported to the

city comptroller and paid over to the treasurer of the city of Memphis.

Sec. 17. Be it further enacted, That no injunction shall be granted by any judge or court in this state upon any bill alleging or involving the unconstitutionality of this act, or of any provisions thereof of the act to establish a metropolitan police district and to provide for the government thereof, or of any provision thereof, whereby any person or officer shall be restrained from performing the duties required of him by this act or by the said act to establish a metropolitan police district, &c., except upon a full hearing on bill and answer; and in case an injunction be granted upon such hearing an appeal shall be made to the supreme court, which, if taken, shall suspend such injunction until otherwise decided upon final hearing in said supreme court.

Sec. 18. Be it further enacted, That whenever the board of mayor and aldermen of the city of Memphis shall make the necessary appropriation and pay in money a sufficient sum to pay the treasurer of the state of Tennessee the money advanced by him on the comptroller's warrant and the money advanced by the Tennessee National Bank for the payment of the metropolitan police force in the city of Memphis, and a sufficient sum to support the said force from month to month, then this act shall be void and of no effect.

Sec. 19. Be it further enacted, That the treasurer of the state is hereby prohibited from making any further payment for the use of metropolitan police purposes at Memphis and Chattanooga and Nashville.

Sec. 20. Be it further enacted, That every officer or appointee of said metropolitan police shall, on the first day of each month, file with the mayor of the city of Memphis a statement under oath showing the amounts of money or property that they have received, or which has passed through their hands as reward for services, for captures, or seizures or assessments, or in any manner or for any purpose whatever, from all persons during the preceding month, giving the name of those from whom received, what for and the dates when received, and account for the whole

amount thereof before they shall be entitled to receive their salaries or compensation as such officer or appointee.

Sec. 21. Be it further enacted, That there shall be established in the county of Shelby, in this state, a board of county commissioners, to consist of five persons, who, previous to their appointment or election, shall have been residents of said county not less than two years, each to serve for the period of five years and until his successor is elected and qualified, except only in case of appointment, as hereinafter provided, one of whom shall be elected by the qualified voters of said county on the first Saturday of March of each year, the first election to take place in the year A. D. eighteen hundred and sixty-eight, and annually thereafter, and until which elections shall take place the said commissioners shall be appointed by the governor of this state, who shall designate in the commissions to be issued to each member of said board the period at which their times of service shall successively expire, the first to hold from the date of his appointment until the election in March, A. D. one thousand, eight hundred and sixty-eight; the second until the election in March, one thousand, eight hundred and sixty-nine; the third until the election in March, one thousand, eight hundred and seventy; the fourth until the election in March, one thousand, eight hundred and seventy-one, and the fifth until the election in March, one thousand, eight hundred and seventy-two. The last named to be commissioned as president of said board and to hold his office as such until the term of his office as commissioner shall expire, after which each member of said board shall be the president thereof, from the commencement until the close of the last year of his term of service.

Sec. 22. Be it further enacted, That whenever it shall become necessary to fill a vacancy occasioned by the death, resignation or removal of any one of said commissioners, the same shall be filled by appointment of the said board of commissioners, but such commissioner so appointed shall hold his office only until the next annual election by the people, and the person elected thereat to fill such vacancy shall serve until the term of the

member whose death, resignation or removal caused such vacancy shall expire; provided, that in all cases the member who shall have actually served or have been elected for the longer period as a member of said board shall be the president.

Sec. 23. Be it further enacted, That before any commissioner, elected or appointed under this act, shall enter upon the duties of his office he shall give bond, with good and sufficient sureties, in the sum of twelve thousand dollars, to be approved by any judge of the court of record in said county, conditioned for the faithful performance of his duties as such commissioner, and shall likewise take and subscribe an oath of office, such as is now required by law for other county officers before any justice, judge or clerk now authorized to administer oaths, and the same shall be indorsed upon the said bond, which bond and approval of the same by the court, together with the oath, shall be filed and entered upon records of said board of commissioners, and in case any person elected or appointed as such commissioner fail to give bond, as aforesaid, before or at the next regular meeting of the said board, his office shall be declared vacant and his successor appointed by the remainder of the board.

Sec. 24. Be it further enacted, That the board of county commissioners shall hold four sessions annually at the city of Memphis at the times now provided by law for the holding of the regular terms of the quarterly court of said county. Three members shall constitute a quorum to do business. In the absence of the president a president pro tem. may be elected. The clerk of the county court of said county shall be the recorder of said board and shall discharge all the duties in reference thereto which he is now required to perform as clerk of the said quarterly court.

Sec. 25. Be it further enacted, That all the powers and duties which are now vested in and performed by the quarterly court of said county shall be vested in the said board of commissioners, and in addition to the powers now conferred by law the said board shall have authority to insure the public buildings and other property of the county; to order and contract for surveys

and maps of the county; to provide for payment of expenses and furnishing court rooms; to establish grades; to purchase record book and all necessary stationery for their own use, as a board, and for the clerk's offices and other courts in the county; to provide for the compensation and expense of jurors as fixed by law; to appoint an attorney for the county, whose duty it shall be to prosecute and defend all suits in behalf of the county, advise said commissioners upon all legal questions, to inspect and examine all bonds of other officers of the county, prepare forms for blanks to be used by said commissioners, attend generally to the interest of the county and all other matters properly within the sphere of his duties which may be required of him by said board; to appropriate money for their own and the salaries of other officers of the county; to provide such additional compensation to the salaries of the judges of the courts of Memphis as may be just and reasonable; to snbscribe stock in railroads which the county court of Shelby county has beent authorized, by general and special law, to subscribe, and under the same conditions and restrictions, and to represent such stock in all elections for directors and provide for payment of subscriptions as made; to fix the salary of the probate judge, and to make all necessary appropriations to carry out the above powers. No money shall be drawn from the treasury except upon a warrant signed by the president of said board of commissioners and countersigned by the county clerk, and said commissioners are hereby vested with all powers which, by the code of Tennessee, have heretofore been vested in the county court in the following sections of the code of the state, viz., 4206, 4207, 4211, 4212, 4213, 4214 and 4215.

Sec. 26. Be it further enacted, That no commissioner of said board shall, directly or indirectly, be concerned in any contract for work to be done or material to be furnished for the county, and any such violation shall, in addition to the penalties provided by law, subject the offender to removal from office.

Sec. 28. Be it further enacted, That the said commissioners, or either of them, are hereby authorized and empowered to ad-

minister all oaths of affirmation necessary in discharging the duties of their respective offices.

Sec. 29. Be it further enacted, That any person or party to any matter determined by said commissioners may appeal from such decisions to the circuit court of the said county or the law court in Memphis within ten days thereafter, notifying the commissioners or their attorney at least ten days before the trial or term in writing, and a copy thereof filed with the attorney or president of said board.

Sec. 30. Be it further enacted, That the compensation of the president of said board shall be three thousand dollars per annum, and, of the other commissioners, each, two thousand five hundred dollars per annum, payable quarterly out of the county treasury.

Sec. 31. Be it further enacted, That the fifth, thirteenth and fourteenth civil districts of Shelby county, in which Memphis, Chelsea and Fort Pickering are situated, shall constitute a judicial district, with a court having a law and criminal jurisdiction, with the civil district aforesaid, as herein prescribed.

Sec. 32. Be it further enacted, That the said court shall be styled and known as the municipal court of Memphis.

Sec. 33. Be it further enacted, That said court shall have a law jurisdiction, concurrent with the law court of Memphis, of all civil cases arising out of, or from contract, wherein the amount sued for does not exceed the sum of three hundred dollars, and also appellate jurisdiction of all cases taken to said court by appeal or certiorari from any of the justices of the peace in said districts. Said court shall also have the exclusive jurisdiction heretofore exercised by the law court of Memphis, of all cases appealed from the recorder's or police commissioners' court of Memphis.

Sec. 34. Be it further enacted, That said court shall have and exercise exclusive jurisdiction of all misdemeanors, and of all crimes and offenses for which the maximum punishment does not exceed five years imprisonment in the penitentiary, committed within the limits of the district aforesaid, and the crimi-

nal court of Memphis shall retain exclusive jurisdiction of all felonies of which the maximum punishment is greater than above specified. The municipal court shall also have exclusive jurisdiction of all appeals from the judgments of justices of the peace in said districts wherein fines are levied under the provision of the code relating to small offences.

Sec. 35. Be it further enacted, That there shall be appointed by the government a judge of the municipal court, who shall hold his office until the regular election in 1870 for the election of judges and officers as prescribed by law, and who shall receive a salary of two thousand five hundred dollars per annum.

Sec. 36. Be it further enacted, That there shall be appointed by the government for the districts aforesaid, as provided for in section 5 of this act for the appointment and election of the judge of said court, a prosecuting attorney, who shall attend the terms of the municipal court and perform similar duties to those required by law of the attorney-general in relating to the business of the criminal court of Memphis and shall receive the same compensation therefor, and who shall hold his office until his successor shall be elected and qualified.

Sec 37. Be it further enacted, That there shall be appointed by the government a clerk of the municipal court of Memphis, whose duties shall be the same as those of the clerk of the law and criminal courts of Memphis, and who shall receive the same compensation therefor, and who may have one deputy. He shall give bond and qualify as required by law of the clerk of the law court of Memphis. He shall hold his office by appointment till the regular election as aforesaid and until his successor shall be elected and qualified.

Sec. 38. Be it further enacted, That there shall be appointed by the government a marshal for said court, to hold his office until his successor shall be elected and qualified as provided by law for the election of county sheriffs in the state, and that he shall receive the same compensation and give bond in the same amount, and perform the duties and have the same powers in

the municipal court, as provided by law for sheriffs. Said marshal shall have the power and authority, by and with the consent of the judge of said municipal court, to appoint one or more deputies for said court, as may be necessary. The duties and powers of said marshal shall be strictly confined to the jurisdiction of said court.

Sec. 39. Be it further enacted, That the municipal court shall hold a term for each month in the year, commencing on the first Tuesday in each month. All process shall be tested as heretofore prescribed by law for other courts. Original process on the law side of the court shall be returnable five days before the day of the term to which it is issued. The terms of the said court for the months of February, June and October of each year shall be for the transaction of business upon the criminal side of the court exclusively, and the remaining terms in each year shall be devoted to the law side of the court exclusively.

Sec 40. Be it further enacted, That all causes on the law side of said court shall be tried by the judge thereof, unless either party to the suit shall insist upon a jury trial; in which case the trial shall be by jury, as in the said court of Memphis; provided, that all appeals from the recorder's or police commissioners' court of Memphis shall be tried by the judge of the court, as elsewhere provided in this act.

Sec. 41. Be it further enacted, That the judge of the municipal court shall issue a venire for twenty-five jurors to attend each term of the law side of said court, and shall appoint a grand jury and two petit juries to attend each term upon the criminal side thereof. He shall have power to enforce the attendance of jurors and witnesses, by fine and otherwise, as in the circuit courts; and shall have all powers granted to judges of other courts necessary to a prompt transaction of the business of the court, to compel obedience to its orders and decrees, preserve order and punish contempts.

Sec. 42. Be it further enacted, That the judge of said court may adopt rules of practice for both the law and criminal sides thereof, in like manner as other judges have power to do in simi-

lar cases, and may enforce the attendance of the officers of the court, as in other courts.

Sec. 43. Be it further enacted, That the judge of said court shall have the power to issue writs of habeas corpus and hear and determine the same, and exercise all the powers of a judge at chambers in all matters within the jurisdiction of said court, but shall not issue extraordinary process to other courts, nor exercise the interchangeable powers not conferred on chancellors and circuit judges.

Sec. 44. Be it further enacted That any person taking an appeal from the judgment of any justice of the peace within the district aforesaid may elect to take such appeal either to the law court, as heretofore, or to the municipal court, as the appellant shall see fit. In case said appeal is taken to the municipal court, it shall be the duty of the magistrate before whom the case is tried to forward the papers therein to the clerk of the municipal court of Memphis without delay, and he shall require an appeal bond, as now required in appeals to the law court of Memphis.

Sec. 45. Be it further enacted, That all appeals from the recorder's or police commissioner's court of Memphis, and the officer holding said recorder's or police commissioner's court shall forward tne papers therein without delay to the clerk of the municipal court. Such appealed cases shall be heard and determined by the judge of the municipal court in accordance with the provisions of so much of chapter 2, title 9, part 3 of the code of Tennessee as pertain to cases appealed faom the recorder's court of Memphis to the law side, and no appeal shall be taken from the recorder's court except in the manner prescribed in that chapter. All judgments in the police court reaffirmed in the municipal court shall be collected for the use of the financial commissioner of the metropolitan police, and shall be paid over to that officer by the clerk of the municipal court. And in all cases where execution issues upon any such judgment and is returned unsatisfied in whole or in part, a mittimus shall issue from the municipal court, committing the original party defend-

ant to the city workhouse, in like manner that the same might issue in the first instance from the recorder's or police commissioner's court.

Sec. 46. Be it further enacted, That appeals and writs of error will lie in all cases from the municipal court direct to the supreme court, as from the law and criminal courts of Memphis.

Sec. 47. Be it further enacted, That the county of Shelby shall furnish suitable rooms, with necessary conveniences and appurtenances for holding the terms of the Memphis municipal court and for the use of its officers.

Sec. 48. Be it further enacted, That all acts and parts of acts conflicting with the provisions of this act be, and the same are hereby, repealed; provided, that the salary of the judge provided for by this act shall be paid by the county of Shelby.

Sec. 49. Be it further enacted, That this act shall take effect from and after its passage.

EXHIBIT 2.

CHAPTER XLVIII.

AN ACT for the benefit of the Winchester & Alabama Railroad Company, and for other purposes.

* * * * * * * * *

Sec. 6. *Be it further enacted*, That the county court of any county through which the line of the Mississippi River Railroad is proposed to run, a majority of the justices in commission at the time concurring, may make a corporate or county subscription to the capital stock of said railroad company, of an amount not exceeding two-thirds of the estimated cost of grading the road-bed through the county and preparing the same for the iron rails; the said cost to be verified by the sworn statement of the president or chief engineer of said company. And after such

subscription shall have been entered upon the books of the railroad company, either by the chairman of the county court, or by any other member of the court appointed therefor, the court shall proceed without further reference or delay, to levy an assessment on all the taxable property within the county, sufficient to pay said subscription; and the same shall be payable in three equal annual installments, commencing with the fiscal year in which said supscription shall be made. And it shall be lawful for county courts making subscriptions as herein provided, to issue short bonds to the railroad company, in anticipation of the collection of the annual levies, if thereby construction of the work may be facilitated; and in all other respects, except as herein specially provided, the capital stock of said railroad company to be subscribed by counties, shall be governed by the general internal improvement laws of the state.

EXHIBIT 3.

CHAPTER XLV.—ACTS OF 1868–1869.

* * * * * * * * *

Sec. 28. *Be it further enacted*, That the stock authorized to be subscribed in the Mississippi Railroad Company by the county courts or county commissioners of the counties along the line of said railroad, may be payable in not exceeding six annual installments, instead of three, as now provided by law.

* * * * * * * * *

Passed February 12, 1869.

MAR 22 1886

118-425

In United States Supreme Court.

EXTEIN NORTON, PLAINTIFF IN ERROR,

vs. } *In Error from the Circuit Court of the United States for the Western District of Tennessee, at Memphis.*

SHELBY COUNTY, DEFENDANT IN ERROR.

BRIEF AND ARGUMENT OF W. B. GLISSON

FOR DEFENDANT IN ERROR.

S. C. TOOF & CO. PRS. & LITHS., MEMPHIS

In United States Supreme Court.

EXTEIN NORTON, Plaintiff in Error,

vs.

SHELBY COUNTY, Defendant in Error.

Brief and Argument of W. B. Glisson,

FOR DEFENDANT IN ERROR.

This suit is brought to enforce the collection of twenty-nine bonds for $1000 each, issued by Barbour Lewis, President of the Board of County Commissioners of Shelby County, to the Mississippi River Railroad Company, in payment of a subscription to said railroad, made by said Board of Commissioners; said commissioners, and Barbour Lewis as its president, claiming thereby to represent and bind Shelby County.

Three hundred bonds in all were issued, each for $1000, and eighty-eight are still unpaid, fifty-nine of which have been sued on in other suits, which, by agreement of counsel and order of the court, are suspended to await and abide the termination of this. The whole amount involved, including bonds, coupons and interest, being now about $175,000.

1. Plaintiff's counsel claim that these are the bonds of Shelby county, duly and lawfully issued, and that plaintiff is a purchaser in good faith, for a valuable consideration.

2. That if the commissioners aforesaid were not properly authorized to represent and bind the county—in other

words, were not a *de jure* commission, or court—still they were a *de facto* court, and being in possession and issuing said bonds in the name of Shelby county, that it is therefore bound by their acts.

3. That though the subscription of stock to the railroad company, and the issuing of the bonds by the commissioners, were illegal and unauthorized in the first place, yet the *County Court of Shelby County* (conceded by them to be the proper authority to act for Shelby county in the premises,) having acquiesced in said acts from the time they regained possession of the County Court room, office and records, on November 15, 1869, up to May 5, 1870, and after, by accepting their tax-books and levies, collecting the taxes levied by the commissioners for paying their bonds, making two new levies for the same purpose, and collecting and paying off additional of these bonds, voting the stock, etc., etc., that the county is thereby estopped from denying its liability on the bonds, and that its acts as aforesaid are a complete ratification of the *voidable* acts of said commissioners.

To the declaration of plaintiff, defendant puts in four pleas of *non est factum*, denying the execution or delivery of the bonds sued on by Shelby county, or by any one lawfully authorized to bind it in the premises, and alleging that the bonds and coupons sued on were made, executed and delivered by Barbour Lewis as President of the Board of County Commissioners of Shelby county—a person assuming to hold an office that did not exist by the laws of Tennessee—and that he therefore had no authority. That said bonds were issued in payment of a subscription made by said commissioners to said railroad company; all of which was done without authority of law; and that said subscription purported to be made and bonds issued under and by virtue of section 6 of an act of the Legislature passed February 25, 1867, amended on 12th February, 1869, and by authority conferred upon them by section 25 of an

act passed March 9, 1867, when neither of said acts, or any other acts of the Legislature conferred any lawful right, power or authority upon said commissioners, or Barbour Lewis, president, etc., or as an individual, to make, execute or deliver said subscription or bonds and bind the county.

See plea in full, Record pages 6 and 7.

See also, copy of bond, Record page 4.

Plaintiff files replications, and defendant rejoins and issues are joined.

See plaintiff's replication, Record pp. 7, 8, 9, 10 & 11.

See defendant's rejoinder, Record pp. 11, 12, 13, 14, 15, 16, 17, 18.

The issues joined, then squarely raise the following questions:

1. Was the act creating the Board of County Commissioners a constitutional act? and did it have the legal effect to displace the previously existing County Court, and install said Board of County Commissioners in its stead?

2. Were the commissioners a *de facto* court, exercising the functions of *de jure* officers, and is the county bound by their acts thus exercised?

3. Could the County Court ratify and confirm the acts of said commissioners? and did it do so?

We contend that the act of March 9, 1867, which purported to create the Board of County Commissioners of Shelby County, was and is unconstitutional and void, and it has been often so decided by our Supreme Court, as we will show further on; but plaintiff's counsel seek to avoid the force of these decisions, because they were made after the subscription was made and the bonds issued by the commissioners.

Chapter XLVI, secs. 21, 22, 23, 24, 25 and 26, of the act passed March 9, 1867, creating the Board of Commissioners

for Shelby county, (see page 70–72 of Acts of 1867,) is identical with secs. 1 to 7, inclusive, of chap. LXV of Acts of 1867–8, passed March 12, 1868, creating the Board of Commissioners for Madison county, the provisions of which were, by section 15 of said last named act, applied also to the commissioners of White county.

See pages 80–83 of said act of 1867–8.

This last act (which is identical with that creating the Board of Commissioners for Shelby county, and now under discussion,) was passed upon by the Supreme Court of Tennessee in the case of Pope et als. v. Phifer et als., 3 Heiskell's Tenn. Rep. 683, etc., *on February 22, 1871.* The opinion in that case was unanimous, and decides—

1. "That the act of 1868, chapter LXV, to create the Board of County Commissioners for Madison county, extending its provisions to the county of White by the 15th section, and conferring on such commissioners appointed by the governor, the powers of the justices of the Quarterly Courts, *is unconstitutional and void.*

2. "The 'County Court' is one of the institutions of this State, recognized in the constitution, and the powers conferred by the constitution upon the justices of the peace, in their collective capacity, are intended to be exercised in the 'County Court.'

3. "The powers to be conferred upon counties to tax, cannot, by any special or local law, be taken from the justices of the peace as a 'County Court' and conferred on local tribunals of particular counties composed temporarily of commissioners appointed by the Governor. Taxation by the County Court, preserves the principles of taxation by the representatives of the tax payers, which the other system infringes."

Prior to the adoption of the State Constitution of 1796, Tennessee was a part of and under the jurisdiction of the State of North Carolina, which State had (and still has) its

County Court, or Quarterly Court, or Court of Pleas and Quarter Sessions.

At the adoption of the State Constitution of 1796, Tennessee recognizing the "County Court," as then in existence, adopted this clause—

Art. 6. "There shall be appointed in each county, *by the 'County Court,'* one sheriff, one coroner, one trustee and a sufficient number of constables, who shall hold their offices for two years. They shall also have power to appoint one register and one ranger for the county, who shall hold their offices during good behavior."

Art. 5, sec. 12, provides that "justices of the peace shall be appointed for each county," and their number was limited to two for each captain's company, except for the company that includes the county town, and in this they should not exceed three. Yet we find in the constitution no provision establishing such court. It is simply referred to, recognized and treated as one of the established and existing institutions of the State, and well understood as the "County Court."

This "County Court" continued to exist and perform its functions, not only as a court of limited jurisdiction in matters of a judicial nature, but also as the "County Legislature," in all matters pertaining to the assessment and collection of county taxes, laying out public roads, building bridges, building and caring for court houses, jails and other public property, and appropriating money for public uses up to the adoption of the constitution of 1834.

This court was all this time composed of the "justices of the peace," representing their respective captain's companies in the county.

Art VI, sec. 15, Constitution of 1834, provides, "that the counties of the State shall be laid off into districts of

convenient size, so that the whole number in each county shall not be more than twenty-five, and there *shall* be two justices of the peace *elected* for each district, including county towns, which shall include three," etc.

Art. VII, sec. 1, provides, among other things, "there shall be elected for each county, by the justices of the peace, one coroner and one ranger, who shall hold their offices for two years."

Art. VII, sec. 2: "Should any vacancy occur subsequent to an election in the office of sheriff, trustee or register, it shall be filled by the justices," etc.

It will be seen that the only change of any moment made in the Constitution of 1796, by that of 1834, was in the provision that the counties should be laid off into convenient districts, and that two justices of the peace should be elected in each, instead of for each captain's company, thus making the "County Court" composed of the "justices of the peace," elected for their respective districts, more directly representative of their respective constituents than before, but they are to have and exercise the same rights, powers and duties as the "County Court" then in existence under the Constitution of 1796.

By the act of 1835, chap. 6, the Legislature established a court in each county to be held by the "justices of the peace," *on the first Monday in each month*—one-third, or twelve, of the justices to be a quorum—three of said justices to have power to take probate of wills, grant letters of administration, etc.

This act was passed under Art. VI, sec. 3, of the Constitution of 1834, which provides, that "courts may be established to be holden by "justices of the peace." But these monthly or quorum courts, as they were called, did not, nor were they intended to supersede the Quarterly County Courts, and the jurisdiction of these monthly or quorum courts was expressly limited.

In commenting on these clauses of the Constitution, Judge Freeman, in the case of Pope et als. v. Phifer et als., says:

"We conclude from this view, inasmuch as *justices of the peace are constitutional officers*, and their functions as such, well-known at the time of the constitution of 1834, and as by Art. VII, secs. 1 and 2, taken in connection with the established order of things at the time, and contemporaneous construction by the Legislature of 1835–36, together with the uniform understanding of all departments of the government from 1834 to the passage of the acts or class of acts in question, the assemblage of the quarterly, or County Court of each county, as the *quasi* representatives of the counties, as corporate or *quasi* corporate communities, is, as we think, most clearly recognized and necessary for the performance of the duties imposed in the Constitution, that no Legislature of Tennessee, or any body short of a constitutional convention can change or alter, or abolish, this established order of things. This having been attempted in this case, and the law having no other purpose, if this purpose fails, the whole law must be treated as a nullity and declared void."

3 Heiskell (Tenn.) R. p. 694.

Again he says:

"We do not mean, in this opinion, to adjudge or decide anything upon the question of the organization of special courts, or of tribunals of any kind in counties, such as special criminal courts, but to confine this opinion to the simple question of *the power of the Legislature to overturn the local government*, so to speak, of a county, displace the assemblage of the recognized organization representing the county *—to whom duties are assigned by the Constitution—*and place in its stead other organizations *unknown to our past history up to the passage of the law, of which the act of 1868 is a part, and never contemplated by the Constitution, nor purposed or provided for in that instrument.*"

Ib. pp. 694 and 695.

In the case of Shelby County v. Benjamin Butterworth, MSS. opinion, and which is printed in full in the Appendix to this brief, in which the right of Butterworth who claimed to be the innocent holder for value of county warrants issued by Barbour Lewis, President of the Board of County Commissioners, to enforce collection of the same against Shelby county, the court, Nicholson, C. J., delivering the opinion, says:

"In two cases decided by this court, one, that of Pope et als v. Commissioners of White County, decided at Nashville, and the other, that of Walker et als. v. Merriman, decided at the present term, we have determined that the Legislature exceeded its constitutional powers in assuming *to abolish the County Court* and substituting in its place a Board of County Commissioners, with the powers before belonging to the County Court. The act of March 9, 1867, (the one under discussion,) was therefore a nullity, and the Board of Commissioners appointed and organized thereunder, was an *unauthorized and illegal body*. The act was inoperative as to the existing organization, powers and duties of the County Court. *Neither the Board of Commissioners nor Barbour Lewis, its president, had any more powers under said act, than if no act had been passed.*"

The case of Walker v. Merriman, above referred to, is printed in the record, pages 81 to 87 inclusive, and was a suit to enjoin and oust these very commissioners, Barbour Lewis et als.

But this act is in conflict with another clause of the Constitution.

Art. XI, sec. 7, of the Constitution of 1834, is:

"The Legislature shall have no power to suspend any general law, for the benefit of any particular individual, nor to pass any law for the benefit of individuals inconsistent with the general laws of the land. Nor to pass any law granting to any individual or individuals, rights, privileges, immunities or exemptions other than such as may

be by the same law extended to any member of the community, who may be able to bring himself within the provisions of such law: Provided, always, the Legislature shall have power to grant such charters of incorporation as they may deem expedient for the public good."

As we have already said, the provisions of the acts under discussion are *identical* with the acts examined and decided upon in the case of Pope v. Phifer et als., in 3 Heiskell, and as to that, the court says:

"The first thing that strikes us on looking at this *strange* enactment of the Legislature, is its startling novelty, as compared with anything that ever existed under our Constitution from the organization of the State, to the date of the act. In the second place, all the presumptions arising from a past history of about seventy years, without having ever been once suggested by any legislative body, rise up against the idea that such an organization or body was ever contemplated by our fathers, who made the Constitution under which the act was passed.

"That taxation and representation necessarily go together, was, and should be an axiom in our government, and if there was any matter upon which we can say that our people were sensitive at the adoption of the Constitution above all others, it was the question *how*, and by *what power*, the taxes they were to pay should be imposed, and that a strict responsibility should attach to those who did impose them.

"Our Supreme Court has held that taxation and representation *must go together*, and the opposite is tyranny, and therefore held that to tax a Cherokee, resident within the limits of the State, without at the same time extending to him the rights of citizenship, would be to practice the same despotic power against which our ancestors rebelled."

Ib. p. 699.

See also,

State v. Ross, 7 Yer. (Tenn.) 74.

Marr v. Enloe, 1 Yer. (Tenn.) 452.

The last two cases are decisions of our Supreme Court on kindred subjects, and made long prior to the passage of these acts, and were therefore a warning to all persons not to rely on the validity of similar acts—such as these in question.

For "where there has been no judicial decision by the appellate tribunal of the State, before the bonds were issued, upon the precise statute or the precise power involved in issuing them, yet if there have been decisions in kindred cases involving the same principles, the Supreme Court will adopt them as part of the law of the contract."

19 Wall 90; 2 Otto 892.

"It is undoubtedly true in general, that this court does follow the decisions of the highest courts of the States respecting local questions peculiar to themselves or respecting the coustruction of their own constitutions and laws. But it must be kept in mind that it is only decisions upon *local questions*—those which are peculiar to the several States or adjudications upon the meaning of the constitution or statutes of a State—which the Federal Courts adopt as rules for their own judgments."

Olcott v. Supervisors, 16 Wall 689.

Township of Elmwood v. Marcy, 2 Otto 294.

The questions determined by our Supreme Court, were upon the force of a local statute, and the meaning of our State constitution.

Assuming then, that it is clear that the act creating the Board of County Commissioners for Shelby county, is, and was, unconstitutional and void; it conferred no power on said board to issue said bonds, and confers no right on the holder to recover on them.

But plaintiff's counsel say, that the commissioners were a *de facto* court, in possession of the county, and that they issued these bonds in the name of the county, and therefore the county is bound.

To this we reply by quoting the language of Nicholson, C. J., in the case of Shelby County v. Butterworth. Appendix:

"But it is insisted, that although Barbour Lewis was not authorized to act as president of the Board of Commissioners, the same being an illegal body, yet, that we may hold that he was acting as chairman or judge of the County Court, and therefore, that though he may not have been an officer *de jure*, yet he was an officer *de facto*. This position is answered by the act of 1867, under which he derived his power. By that act he came into existence, as part of the Board of Commissioners, by appointment of the Governor, and he was specially appointed to supersede the chairman of the County Court, or the judge thereof.

"The decisions which held that the Board of Commissioners was an illegal and unconstitutional body, necessarily included the president of that board, and declared his office a nullity *ab initio*. This left the organization of the County Court in its former integrity, with its officers entitled to its offices, and creating no vacancy to be filled by the illegal action under the act of 1867.

"It follows that Barbour Lewis could not be a *de facto* officer, as there was no legal board of which he could be president, and as there was no vacancy in the legal organization.

"The warrants issued by him show the character in which he was acting, and repel the presumption that he was a *de facto* officer.

"He could be, under the circumstances as one can judicially know from the law and the pleadings in the case, *nothing but a usurper*. There must be a legal office in existence which is being improperly held, to give to the acts of such incumbent the validity of an officer *de facto*."

Hildreth v. McIntyre, 1 J. J. Marshall 206.

The bonds in this case, as the warrants in the case above, show upon their face that they were issued by Barbour

Lewis, president of the Board of County Commissioners, and not as justice, chairman or judge of the County Court.

Moreover, the bonds on their face cite the acts under which they were issued, which are notice of their contents as much as if said acts were incorporated in the bond, and the first of these acts provides—

Sec. 6. "That the *County Court* of any county through which the line of the Mississippi River Railroad is proposed to run, a *majority* of the *justices in commission at the time concurring*, may make a corporate or county subscription," etc.

Chap. 48, sec. 6. Passed Feb. 25, 1867.

The next act referred to in the face of the bond, amends the above section, thus:

"Sec. 1. * * * That the subscription authorized in said sixth section to be made to the capital stock of the Mississippi River Railroad Company, by the counties along the line of said railroad, may be made at any monthly term of the County Courts of said counties, or at any special term of said courts; *provided* that a majority of all the justices in commission in the counties respectively shall be present when such subscription is made; and *provided further*, that a majority of those present shall concur therein."

Chap. 6, Act of 1867. Passed Nov. 5, 1867.

Neither of the above acts speak of, recognize, or in any way refer to the county commissioners, though the last act above was passed *eight months after the act creating the Board of Commissioners for Shelby county;* but both these acts expressly provide that the subscription may be made by the *County Court;* and that upon the proviso, that *a majority of all the justices in commission shall be present, and a majority of those present shall concur therein.*

Now we ask, in view of these recitals in the face of the bonds, was not a purchaser, either before or after due, and for value, fully notified and warned of the illegal and void character of these bonds? The authority to subscribe for stock and issue bonds was *given* to the *County Court*, the subscription was made *by the Board of Commissioners*, the bonds were issued by *Barbour Lewis, president, etc.*

Plaintiff's counsel start out by saying: "These bonds purport on their face to be the obligations of the defendant county, and have thereon the impress of the county seal; they are signed by the clerk of the County Court officially, and the seal is the seal of that court."

Counsel are mistaken in the above assumption.

John Loague says, "I was clerk of the County Court of Shelby county, from January 1, 1866, to November, 1869, and after. Thomas Leonard was Judge of the County Court all this time, and held his regular courts as such judge; he had a seal different from that impressed on the bonds here sued on. I signed those bonds and affixed the seal at the instance and under the direction of the county commissioners, and not of Judge Leonard. I attached the seal to said bonds, as it was the seal kept by me as clerk of the County Court."

See Record, p. 80, Jno. Loague's testimony.

The seal, then, was the seal of the clerk, and not the judge of the County Court; but the judge had a seal as such judge.

Code of Tennessee (of 1858,) provides, sec. 420: "The county judge, in those counties in which such officer is elected, presides over the County Court and performs all the duties of the *chairman of the County Court.*"

Sec. 421. "The judge or chairman of the County Court shall be the accounting officer and general agent of the county, and as such, he shall have power and it shall be his duty." * * * * * *

5. "To draw and seal with the *seal of the County Court*, all warrants upon the county treasury."

So, if a seal is important, it should have been *the seal of the County Court*—the one kept by Leonard as judge—and not the seal of the clerk, Mr. Loague.

Besides this, by the express terms of the act purporting to create the Board of Commissioners, the county clerk was to be the *Recorder* of said Board, and if his signature and seal could be of any force in any case, it could only be so when affixed as *Recorder* of the Board of County Commissioners, and not as clerk of the County Court.

Again, it was attached, says Mr. Loague, "at the instance and under the direction of the county commissioners, and not of Judge Leonard," hence the act was unauthorized.

We come now to the last ground insisted on by plaintiff's counsel.

They claim that as the County Court had the power to make said subscription and issue said bonds under the law at the time they were made and issued, that though it did not do so, and the county commissioners improperly and without authority assumed to act for the county in making them, that the county by the action of the County Court, receiving the tax books and levies made by the commissioners, collecting the taxes and paying off a part of the bonds and coupons, voting the stock in the stockholders' meetings, agreeing to the consolidation, etc., ratified the acts of the commissioners, which was equal to making the subscription and issuing the bonds in the first place; and that the county is estopped from denying its liability.

Defendant admits in the pleading, that the County Court by a majority of the magistrates, as provided in the acts above cited, could have made the subscription of stock and issued the bonds in payment thereof before and up to May

5, 1870, but that they did not do so; and that on May 5, 1870, a new constitution for the State of Tennessee went into effect, which has in it this clause:

Sec. 29. "The credit of no county, city or town, shall be given or loaned to or in aid of any person, company, association or corporation, except upon an election to be first held by the qualified voters of such county, city or town, and the assent of three-fourths of the votes cast at said election. Nor shall any county, city or town become a stockholder with others in any company, association or corporation, except upon a like election and the assent of a like majority."

The plea further avers that since the adoption of said constitutional provisions, no election has been had as required thereunder for the purpose of making a subscription, or ratifying the acts of said commission, etc.

Almost this precise case has been at least four times passed upon by the Supreme Court. In Aspinwall v. Commissioners Daviess County, 22 Howard 363; Harshman v. Bates County, 2 Otto 569; Township of Elmwood v. Marcy, 2 Otto 289, and Marsh v. Fulton County, 10 Wall. 677.

We quote:

"Where supervisors of a county possessed no authority to make a subscription or issue bonds to a railroad company, in the first instance, without the previous sanction of the qualified voters of the county, they could not ratify a subscription to the company without such authority," and "where county bonds are issued without any authority, they are invalid in the hands of an innocent purchaser. The authority to contract must exist before any protection as innocent purchaser can be claimed by the holder."

Marsh v. Fulton County, 10 Wall. 696.

"Where the construction of the constitution, or the statutes of a State, has been fixed by an unbroken series of

decisions of its highest courts, the courts of the United States accept and apply it in cases before them." Hence this court conformably to the opinion of the Supreme Court of Illinois, holds that the bonds issued April 27, 1869, by the supervisor and town clerk of the township of Elmwood, in that State, by way of payment of an additional subscription of $40,000 of stock of the Dixon, Peoria and Hannibal Railroad Company over and above the amount authorized by the original charter of that company, are not binding on the township."

Township of Elmwood v. Marcy, 2 Otto 289.

"Section 14 of Art. 11 of the Constitution of Missouri declaring that—

1. "The general assembly shall not authorize any county, city or town to become a stockholder in, or to loan its credit to any company, association or corporation, unless two-thirds of the qualified voters of such county, city or town, at a regular or special election to be held therein, shall consent thereto, extends as well to townships, as to counties, cities and towns."

2. Although subscription for stock of a railroad company be duly authorized by the requisite number of the qualified voters of a township, if the company before the subscription be actually made, becomes consolidated with another, thereby forming a third, the county is not empowered to subscribe on behalf of the township for stock of the new company, and issue bonds in payment therefor."

3. The holder of coupons attached to the bonds in question in this suit, is not entitled to recover thereon, as sufficient notice of the objection to the bonds is contained in the recitals."

Harshman v. Bates County, 2 Otto 569.

"The charter of the Ohio and Mississippi Railroad Company, passed by the Legislature of Indiana in 1848, and a supplement in 1849, authorized the county commissioners

of a county through which the road passed, to subscribe for stock and issue bonds, provided a majority of the qualified voters of the county voted, on the 1st of March, 1849, that this should be done. The election was held on the appointed day, and a majority of the voters voted that the subscription should be made.

"But before the subscription was made the State adopted a new constitution, which went into effect on the 1st of November, 1851. One of the articles prohibited such subscriptions, unless paid for in cash, and prohibited also, a county from loaning its credits, or borrowing money to pay such subscriptions.

"In 1852, the county commissioners of Daviess county subscribed for stock in the railroad company, and issued their bonds for the amount.

"The provisions of the railroad charter, authorizing the commissioners to subscribe, conferred a power upon a public corporation, or civil institution of government, which could be modified, changed, enlarged, or restrained by the legislative authority, the charter not importing a contract within the meaning of the clause of the constitution prohibiting a State from passing a law impairing the obligation of a contract.

"The mere vote to subscribe did not, of itself, form such a contract with the railroad company as would be protected by the 10th section of the 1st article of the Constitution of the United States. *Until the subscription was actually made, the contract was unexecuted.*

"The bonds were issued in violation of the constitution of Indiana, and are therefore void."

Aspinwall v. Commissioners of Daviess County, 22 How. 365.

The result of the above cases is therefore, to settle the following points:

1. A subscription made, and bonds issued without any authority is absolutely void, and cannot be ratified and

made binding, and a purchaser of such bonds or coupons cannot avail himself of the plea of innocent purchaser.

2. That a purchaser of bonds which recite on their face the authority under which they were issued, must take notice of all said recitals contain, and if they show by such recitals a want of authority, he buys at his peril.

3. When the construction of the constitution of a State, *or its statutes*, has been fixed by an unbroken line of decisions, by the highest court in the State, the courts of the United States accept and apply it.

4. When a subscription is *authorized to be made, though not actually made*, until after the adoption of a new constitution, prohibiting the making of it, except upon certain conditions, *that it cannot afterwards be made*, except in exact compliance with the new constitution, and although the preliminaries were gone through with before the adoption of the new constitution, if the subscription *was not actually* made *before, it is void, and the bonds are void if made afterward.*

5. The authority for commissioners or County Courts, (whichever may be the proper authority,) to subscribe to a railroad, under its charter, is a power conferred upon a public corporation, or civil institution of government, which can be modified, changed, enlarged or restrained by the legislative authority, the charter not importing a contract within the meaning of Art. I, sec. 10, of the Constitution of the United States. In other words, no contract can be impaired until made, none is made until the subscription is actually made by the proper authority, and until this is done, the State may change its constitution prohibiting such contract, or might pass an act prohibiting it, which would not conflict with the above clause of the Federal Constitution.

We think that we have conclusively established the following propositions:

1. That the Board of County Commissioners were an unconstitutional body of *usurpers*, with no power to bind the county.

2. That the bonds sued on, by the recitals on their face, notified the world of their void character.

3. That no subscription, nor anything amounting to one, was ever made by any body authorized to bind the county, up to the adoption of the Constitution of 1870, and

4. That after that time it could not do so, though it acted in the most formal manner, except by a vote of three-fourths of the qualified voters of the county, and that no such vote was ever given.

The plea of innocent purchaser can avail plaintiff nothing, because the recitals on the bonds gave him notice of the defenses of the county, and he was bound to take notice of them.

Besides this, he had actual notice.

Extein Norton, plaintiff in this cause, gives his deposition, which is in evidence, and in answer to interrogatory 2, says:

"I was at one time president and director of the Mississippi River Railroad Company, became such about *1870*. I resigned, I think, my position as *president*, in the latter part of 1870. I was the president of the Paducah and Gulf Railroad Company in 1869, and from that time up to the time of the consolidation of said Paducah and Gulf Railroad Company with the Mississippi River Railroad Company. After the consolidation, the new company was called the Paducah and Memphis Railroad Company. I was elected president of the latter company about the time of the consolidation. I think I continued to be president until said road was sold under foreclosure in 1875 or 1876."

See Record, p. 71.

He further says, on page 72 of record, that he went before the County Court at the October term, 1871, when these bonds were discussed.

At this term the following order stood upon the minutes of the County Court:

"Friday, July 7, 1871, one of the days of the July term, 1871, of said Quarterly Court; present, Esq. Thomas C. Bleckley, chairman, and Esquires Witherington * * * * et als., the following entry appears:

" Whereas, on April 12, 1871, the same being one of the days of the April term, 1871, of this court, an order was passed assessing a tax of fifteen cents on the one hundred dollars' worth of property in Shelby county, to pay the bonds issued by Barbour Lewis, president of the Board of County Commissioners, to the Mississippi River Railroad Company; and whereas, said tax was levied conditioned upon the 'proper appropriation of funds,' and 'the prosecution of the work on said railroad with due diligence;' and whereas, the said tax was levied upon a misapprehension, or without a knowledge of the law in the case; and whereas, the *Supreme Court of Tennessee* has lately decided that the acts of Barbour Lewis as president of the Board of County Commissioners of Shelby county, were unauthorized and void; and whereas, the said bonds were issued by the said Barbour Lewis, president, etc., without the consent of this court, had and obtained according to law; and whereas, it appears to the satisfaction of the court, that the said railroad company have not, nor are not, prosecuting the work on said road with due diligence; and whereas, this court has been advised that said tax assessment is illegal: Now, therefore, for the joint and several reasons above stated, be it ordered by the court, that the said order of April 12, 1871, laying a tax of fifteen cents on the one hundred dollars' worth of property as aforesaid, be, and the same is hereby reconsidered, revoked and held

for naught, and the tax collector of Shelby county is hereby ordered to fail and refuse to collect said tax."

See Record, pp. 39 and 40.

This order is introduced in evidence by the plaintiff, and he is bound by its statements.

It shows that the County Court of Shelby county had, up to that time, in all their acts in reference to the said subscription and bonds, and their making of tax levies and collecting and paying out the same and redeeming the bonds, had been acting in ignorance of their rights, powers and duties under the law; and that now the Supreme Court had decided that Barbour Lewis, as president, etc., had no power to bind the county, they hastened to undo what they had illegally attempted to do; they therefore revoked the order of April 12, 1871, assessing a tax to pay said bonds.

It will be remembered, that before this, on May 5, 1870, the new constitution went into effect, Art. 11, sec. 29, of which prohibited the County Court making a subscription, etc., hence, what the County Court had done up to July 7th, 1871, it had done in ignorance of its rights, powers and duties, and it was not bound by it.

After May 5th, 1870, it could not make any subscription, etc., without being first authorized to do so by a three-fourths vote of the qualified voters of the county, and no such election was held, and no subscription, etc., was attempted to be made.

The evidence of Norton, above, shows that he, as president of and stockholder and director in the Mississippi River R. R. from 1869, was interested in the bonds; that besides the legal notice contained in the recitals, he had actual notice that the bonds were disputed, and that he came before the County Court, at its October term, 1871, to have the matter adjusted.

Not only this, but the case of Walker et als. v. Merriman et als., printed in full in the record, page 81, etc., had just been decided by the Supreme Court of Tennessee, in which the court decrees that complainants (who comprised every justice of the peace in Shelby county at the time) "were entitled to the relief sought." The case of Pope et als. v. Phifer et als., had also recently been decided by the Supreme Court, and published, and was notice to the world.

As to the point insisted on by plaintiff's counsel, that the County Court ratified and validated the acts of the commissioners, we deem it unnecessary to discuss at length. We simply submit the propositions—

1. Where the act sought to be ratified is absolutely void, it is incapable of being validated by ratification.

2. Where the act sought to be ratified is merely voidable, the act of ratification must be performed by a person, or body, capable of performing the act, at a time and in a manner required, in good faith and with a knowledge of his rights, powers and duties, and of the legal consequences. And we cite the following authorities as sustaining the above propositions:

Jones on R. R. Securities, secs. 278, 279, 280, 297, 298 and 299.
Supervisors v. Schenck, 5 Wall. 781.
Dillon on Mun. Corp., sec. 385.
71 New York 514–524.
17 New York 454.
7 Hump. (Tenn.) 452.

Upon the facts in the record, before them, Judge Matthews, sitting with Judge Hammond, in the court below, directed the jury to find a verdict in favor of the defendant, to which we confidently submit plaintiff can assign no legal error, nor make any just complaint.

W. B. GLISSON,
For Shelby County.

APPENDIX.

SHELBY COUNTY
vs. } Opinion.
BENJ. BUTTERWORTH, &c., &c.

It is prescribed by the Code, Art. 3, p. 148, that the Judge or Chairman of the County Court shall preside over the court and be accounting officer and general agent of the county, to audit all claims for money against the county and to draw and seal with the seal of the County Court all warrants upon the county treasury; and no money shall be drawn out of the treasury of the county except upon the warrant of the Judge or Chairman of the County Court.

By the provisions of the Code, p. 755, a majority of all the magistrates of the county is required to levy a tax or to appropriate public money to an amount over $50, and, at the first term each year, the County Courts are required to impose and provide for the collection of taxes for county purposes and fix the rate thereof, and in making appropriations of money the vote of the Justices present shall be taken by ayes and noes and be recorded.

These provisions of the Code were in force until the passage of the act of 1867, ch. 46, sec. 21, p. 70. By this act a Board of Commissioners for Shelby county, consisting of five persons, was established. To this Board of Commissioners was transferred all the powers and duties previously vested in and performed by the Quarterly Court.

After conferring various specific powers on the Board it is enacted that no money shall be drawn from the treasury except upon a warrant signed by the President of the Board and countersigned by the County Clerk. The magistrates

of Shelby county were relieved from all further duties and obligations incident to their office as members of the Quarterly Court. Full powers were vested in the Board of Commissioners to levy and collect taxes and appropriate the same to county purposes.

Under this act a Board of Commissioners was appointed, of which Barbour Lewis was President, and J. B. Woodward was appointed County Attorney. In the execution of his office as President of the Board, Barbour Lewis issued a number of warrants on the county treasury for the payment of county dues, which were transferred and assigned, by the several holders thereof, to Benj. Butterworth, who commenced his suit thereon in the Municipal Court of Memphis, at the August term, 1869. The summons ordered the Marshal of the Municipal Court to notify the county of Shelby to appear and answer Benj. Butterworth to his damage, $4000.

The summons was returned by the Marshal, endorsed, "executed on Barbour Lewis, Chairman Board County Commissioners for Shelby county, and on J. B. Woodward, County Attorney, July 27th, 1869."

The declaration sets out in detail the several warrants sued on, giving the number, dates, to whom payable, their amounts and for what issued, and all signed by Barbour Lewis, President Board of Commissioners of Shelby county, and countersigned by John Loague, County Clerk. On the 9th day of August, 1869, judgment by default was taken against the county of Shelby for $4297.51, no appearance having been made by the county.

The county of Shelby brings the case here by writ of error.

In two cases decided by this Court, one that of Pope et al. v. Commissioners of White county, decided at Nashville, and the other that of Walker v. Merriman, decided at the present term, we have determined that the Legislature exceeded its constitutional powers in assuming to abolish the County Court and substituting in its place a Board of Com-

missioners with the powers before belonging to the County Court. The act of March 9th, 1867, was, therefore, a nullity, and the Board of Commissioners appointed and organized thereunder, was an unauthorized and illegal body. The act was inoperative as to the existing organization, powers and duties of the County Court. Neither the Board of Commissioners nor Barbour Lewis, its President, had any more powers under said act than if no act had been passed. In the language of Judge Cooley, p. 188 of his work on Constitutional Limitations, "when a statute is adjudged to be unconstitutional, it is as if it had never been. Rights cannot be built up under it, contracts which depend upon it for their consideration are void; it constitutes a protection to no one who has acted under it, and no one can be punished for having refused obedience to it before the decision was made."

The declaration sets out the several warrants, *showing upon their faces that they were issued by Barbour Lewis as President of the Board of Commissioners of Shelby county.* We know, judicially, that the County Court, through its Judge, was the only legal authority by which such warrants could be issued. The claims on which plaintiff founded his right to sue were, therefore, illegal and void, and being illegal and void in their inception, they were as invalid and unavailable in the hands of the plaintiff as in the hands of the original holders. The county of Shelby was not bound to pay the same, either to the first holders or their assignee.

The first element to give the warrants validity was wanting, viz.: authority in the Board of Commissioners, or its President, to issue them. Colley 212, et seq.; Marsh v. Fulton county, 10 Wallace 676; Olcott v. Fond Du Lac county, Wisconsin case.

But it is insisted that although Barbour Lewis was not authorized to act as President of the Board of Commissioners, the same being an illegal body, yet that we may hold that he was acting as Chairman or Judge of the

County Court, and, therefore, that though he may not have been an officer *de jure*, yet he was an officer *de facto*. This position is answered by the act of 1867, under which he derived his powers. By that act he came into existence as part of the Board of Commissioners, by appointment of the Governor, and he was specially appointed to supersede the Chairman of the County Court, and the Judge thereof. The decisions which held that the Board of Commissioners was an illegal and unconstitutional body necessarily included the President of that Board, and declared his office a nullity *ab initio*. This left the organization of the County Court in its former integrity, with its officers entitled to their offices and creating no vacancy to be filled by the illegal action under the act of 1867.

It follows that Barbour Lewis could not be a de facto officer, as there was no legal Board of which he could be President, and as there was no vacancy in the legal organization. The warrants issued by him show the character in which he was acting, and *repel the presumption* that he was a *de facto officer. He could be under the circumstances, as we can judicially know from the law and the pleadings in the case, nothing but a usurper. There must be a legal office in existence, which is being improperly held, to give to the acts of such incumbent the validity of an officer de facto. Hildreth v. McIntyre*, 1 J. J. Marshall 206.

It will be found, upon examination of the several cases in which the court have recognized the acts of officers *de facto* as binding and valid, they were instances of illegally holding offices which had a legal existence. See 3 Head 690; 2 Cold 605; and 1 Heisk 764.

The decisions as to the *de facto* character of the State governments in time of war have no applicability to the case before us. They rest upon distinct international principles, growing out of and dependent upon a state of war. Hildreth v. McIntyre, 1 J. J. Marshall 206.

It follows that the county of Shelby was never legally

summoned to appear and answer the complaint, the same having been executed on officers without authority to represent the county. The illegality appearing on the face of the declaration, we can take jurisdiction of the case and reverse the judgment by default and dismiss the suit. Eakin v. Burger, 1 Sneed 424.

NICHOLSON, Judge.

STATE OF TENNESSEE.

I, John H. Freeman, Clerk of the Supreme Court of said State, for the Western Division thereof, at Jackson, do hereby certify that the foregoing is a true, perfect and complete copy of the opinion pronounced by said court at its April term, 1871, in the case of Shelby county against Benj. Butterworth, as appears of record now on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of the Court at office in the City of Jackson, on this, the 18th [SEAL] day of February, A. D. 1882, and of the Independence of the United States, the 106th year.

JNO. H. FREEMAN, Clerk,
By D. P. DAVIS, D. C.

Office Supreme Court U. S.
FILED.
MAR 22 1886
JAMES H. McKENNEY.
CLERK.

118-425

Supreme Court of The United States.

EXSTEIN NORTON,
Plaintiff in Error,
vs.
SHELBY COUNTY,
Defendant in Error.

Error to the Circuit Court for the Western District of Tennessee.

BRIEF AND ARGUMENT OF R. D. JORDAN, OF COUNSEL FOR DEFENDANT.

TRACY & CO., PRINT., 299 MAIN ST., MEMPHIS

Supreme Court of The United States.

EXSTEIN NORTON,
Plaintiff in Error,
vs.
SHELBY COUNTY,
Defendant in Error.

BRIEF AND ARGUMENT OF R. D. JORDAN, OF COUNSEL FOR DEFENDANT.

FACTS.

This suit is brought to enforce the collection of twenty-nine (29) bonds of defendant county, issued on the 1st day of March, 1860, by the Board of County Commissioners of Shelby county, in part payment for a subscription for three hundred thousand dollars of stock in the Mississippi River Railroad Company, and are of the denomination of $1000 each, due and payable on the 1st day of January, 1875, with interest payable annually on the 1st day of January of each and every year, the whole three hundred thousand dollars being represented by 300 $1000 bonds, maturing in six installments of $50,000, due respectively on the 1st day of January, 1870, 1871, 1872, 1873, 1874 and 1875.

The defendant first filed a demurrer, which was overruled, and then filed a plea of *non est factum*, averring that the bonds were not the act or deed of the county, nor binding upon it, because executed by the Board of County Commissioners, a body not authorized by law to bind it in the premises.

To this plea, by leave of court, plaintiff filed several replications, and to these replications defendant filed lengthy rejoinders, and plaintiff filed rebutters, which make simply an issue on the replication.

The issues raised by the record are:

1st. Was the subscription as made and bonds as issued by the board of county commissioners valid and binding on Shelby county?

2nd. If not originally valid and obligatory, has the defendant county, by receiving, voting and retaining the stock, levying and collecting taxes, and paying certain bonds issued and the interest thereon, and by alleged assurances to the plaintiff in error that the same were valid and would be paid, ratified the subscription and estopped itself from asserting their invalidity?

BRIEF AND ARGUMENT.

The defense of this suit rests upon the ground that the subscription as made and the bonds issued by the Board of Commissioners of Shelby county are not binding and obligatory on the defendant in any manner, because the same were executed by a body of usurping corporate officials, proceeding under a void act of the Legislature, and therefore without authority. Being an illegal body, all their acts were absolutely void and utterly incapable of being ratified or confirmed by the rightful corporate officials upon their return to power.

I.

From the time of the adoption of the constitution of Tennessee, in 1796, down to the passage of the acts of the Legislature of March 7, 1867, creating a Board of Commissioners, the local government of each county in the State was managed and controlled by the county or quarterly court of each county, composed of the justices of the peace of each district in said counties.

To wipe out and destroy this ancient representative of local government and administration of county affairs the act of 1867, chapter XLVI., "Appendix A," was passed, creating for Shelby county five commissioners, to be appointed by the governor of the State, vesting them with all the powers and duties of the quarterly court. Similar acts in 1868 were passed by the Legislature for the counties of Madison, White and Sumner. This form of government applied solely and exclusively to four counties of the state of Tennessee.

We insist that the county court of quarterly sessions, composed of the justices of the peace of each district of the county, was and is a tribunal of civil government, recognized by the constitution of 1834, and *alone* had the power to make the subscription and issue the bonds; that the Legislature did not have the constitutional power to pass an act abolishing it; that this act was not the law of the land within the meaning of the constitution, but an exceptional enactment applicable to one or more counties, and not a general law operating equally and alike over the entire territory of the State of Tennessee; that it created officers wholly unknown to or recognized by the laws of Tennessee—not chosen by the people, but appointed by the governor—clothing them with power to lay taxes on the people. This was illegal, and said act of the Legislature was unconstitutional and void.

The constitution of 1796 recognized the county court as one of the existing institutions of the political and civil divisions of the territory comprising the State. The constitution of 1834, which succeeded that of 1796, and the same existent at the time of the passage of this act, set forth the duties of the justice of the peace who constituted the county court.

The first recognized the county court as an established representative of the county by speaking of it by name,

while the second recognized it also, but in a different manner, by providing for the officers of that court and defining their duties.

Article 6, Constitution 1796.
Article 7, Section 1, Constitution 1834.

That by "justices of the peace" in article 7, section 1, of constitution of 1834, was meant precisely the same thing as "county courts" in article 6 of the constitution of 1796.

Pope vs. Phifer, 3 Heiskell, hereinafter fully cited.

It is argued by the opposing counsel that the legislature can do all acts not prohibited by the constitution of the State or of the United States. This is true, but the prohibition to exercise a particular power or make a particular enactment need not however be expressed, but may be implied. And such implication may be said to fairly arise when it can be seen from the constitution that certain arrangements therein provided for, or certain institutions or parts of the existent organizations of the State are referred to as being the agencies charged with the performance of certain duties by the terms of that instrument, and that the existence of these agencies was contemplated as continuing, and was thus, however remotely, recognized by the constitution.

Such references would amount to a fairly implied constitutional establishment of, or recognition and continuance of such existing agencies or organizations.

Ibid.

On the 9th day of April, 1867, a short time after the passage of this act, the justices of the peace of the county court of Shelby county, as such, and as citizens and taxpayers of the county, filed their bill in the chancery court of the county, claiming under advice of counsel that the said act was unconstitutional and void, and that this

Board of Commissioners were usurpers, etc. See P. R., page 81..

The case having been decided adversely to complainants, they appealed to the State supreme court, *and pending this litigation* in the *higher* court, these bonds were issued by said Board of Commissioners.

Before this case was reached for final hearing, the supreme court of the State in the above mentioned case of Pope, et. als., vs. Phifer, et. als., reported in 3 Heiskell, page 683, passed directly upon a similar statute enacted by the legislature for Madison county, and extended to White county, wherein it decided, after a thorough and elaborate investigation, the following points:

(1) That the act of 1868, creating a Board of Commissioners for Madison and extended to White county, conferring on such Commissioners, appointed by the Governor, the powers of justices of peace of quarterly courts, is *unconstitutional and void.*

(2) That the county court is one of the institutions of the State, recognized in the constitution, and the powers conferred by the constitution upon the justices of the peace, in their collective capacity, are intended to be exercised in the county court.

(3) The power to be conferred upon counties to tax, cannot, by any special or local law, be taken from the justices of the peace, as a county court, and conferred on local tribunals of particular counties, composed of Commissioners appointed by the Governor, even temporarily.

(4) Taxation by the county court preserves the principle of taxation by the representative of the tax payers, which the other system infringes.

The case of State ex rel Walker, et. als. vs. Merriman, et. als., Commissioners, was decided in the same manner as the case of Pope, et. als., vs. Phifer, et. als. See P. R. page 81, declaring these very commissioners to have

usurped the office under which they executed and delivered the bonds in suit.

Following these cases was that of Butterworth vs. Shelby county, Mss. 1871, a suit instituted to hold the county of Shelby liable for certain county warrants issued by Board of Commissioners and signed by the president thereof. The court reaffirmed the decision in Pope, et al., vs. Phifer, et al., and Walker, et al., vs. Merriman, et al., *holding the act of* 1867 *unconstitutional and void, and giving to said commissioner no more power under said act than if no act had ever passed*, and hence that county warrants issued by the Board of Commissioners were void, whether in the hands of the first taker or an indorsee.

In State vs. Peacock, M. S., 1871, the defendant was indicted for taking upon himself to exercise and officiate in the office of the president of the Board of Commissioners of the county of Sumner. It was held that the statute creating the officer of commissioner was unconstitutional and void, and the offense charged did not come within the provision of the code.

Opposing counsel attack the decisions of the supreme court of the State on these questions, and accuse it of inconsistency and vacillation, and claim for these reasons they will not be followed. The cases referred to do not justify the assault.

Whenever the question involving the validity of the acts of the commissioners has come before the supreme court of Tennessee the result has been the same, the court uniformly holding in accord with the cases cited.

In State vs. McLean, 8 Heiskell, 237–8, the court held: "That the law creating the board of county commissioners, so far, at least, as it authorized said board to usurp the constitutional functions of the county court, was in violation of the constitution, and their acts without authority of law is a proposition not denied."

In Leuhrmann vs. Taxing District, 2 Lea, page 444, a r oted case, the question as to the power of the Legislature to abolish municipal corporations was involved, and the court elaborately discussed the subject, and in course of reasoning made the following declaration:

"Although municipal corporations existed at the "adoption of the constitution and are recognized by it, yet "no provision is made in it for their existence or perpetuat- "ing any of their forms or rights, as in the case of the "county courts, citing and adopting the law as laid down "in Pope vs. Phifer."

The plaintiff's counsel misconceive the opinion of Judge Freeman in Lauderdale Co. vs. Farguson, 7 Lea, 166. That case did not involve the validity of the appointment of a Board of Commissioners. The controversy was as to the validity of the act allowing county courts, a majority of the justices present concurring, to subscribe stock in aid of railroad companies passing through said county, and his reasons clearly distinguish the two classes of cases, and on page 166 the court but reaffirms the law as declared in Pope, et als., vs. Phifer, et als.:

"Every county is a corporation and the justices of the county court assembled are the representatives and authorized to act for it. In view of this, as well as the general theory that underlies our system of state government, the county courts are the appropriate bodies to do all that is to be done by the counties, the county court assembled, the representatives of the corporation."

The case of Halsey vs. Gaines is cited as impliedly overruling the case of Pope, et als., vs. Phifer. We beg leave to say it does nothing of the kind. The court there distinctly recognizes the fact that if the system of circuit or chancery courts was destroyed the act of abolishing Halsey's court would be unconstitutional. Here the entire system of county courts in three or four counties was

wiped out and a new system, unknown to the constitution of Tennessee created; but, moreover, the sole question before the court in this case was whether a circuit judge, whose court had been abolished by the Legislature that created it, was entitled to his salary for the term to which he was elected, the abolition having transpired before the expiration of his term.

The case is, therefore, not authority against those already cited and quoted by us in support of the question presented.

The cases of Moore vs. State, 5 Sneed and Wilcox vs. State, 3 Heiskell, decided before Pope, et. als. vs. Phifer. et. als., and other cases cited above, involved the validity of acts creating *local* courts, not "*governing agencies*," and were never intended to be classed by the State courts with cases involving such questions as were decided in Pope vs. Phifer, et. als.

This is manifest from a portion of the opinion which holds:

"We do not mean in this opinion to adjudge or decide anything upon the question of the organization of special courts, or ot tribunals of any kind in counties, such as special criminal courts, but confine this opinion to the simple quession of the power of the legislature to overturn the local government, so to speak, of a county, displace the assemblege of the recognized organization representing the county to whom duties are assigned by the constitution, and place in its stead other organization unknown to our past history up to the passage of the law of which the act of 1868 is a part, and never contemplated by the constitution nor purposed or provided for in that instrument.

The supreme court of Tennessee has had but one opinion in regard to the above named acts, and that has been a united and persistent one, wherever and whenever the question has been raised, first and last, to hold them un-

constitutional, and the acts of the persons holding offices under them, illegal and void.

The constitution of Tennessee limited the taxing power to the legislature, and designated the county court as the instrumentality for fixing the rate and providing for the collection of taxes for county purposes.

Art. 2, Sec. 29, Const. 1834.

This chosen instrumentality and prescribed mode is in exclusion of all others.

3 Heisk., 682, 691, 692 & 693.
6 Cold., 128–133.
1 Yerger, 452–454.

The supreme court of Tennessee has uniformly, in construing above section of constitution, held that the Legislature had no power to delegate the taxing power, except to counties or incorporated towns.

2 Lea, 443.
8 Heisk., 857.
1 Yerger, 452.

The endeavor, by the act of 1867, to create the Board of Commissioners for Shelby county and to take away from the county court the power to impose county taxes, was repugnant to the constitution and void.

3 Heiskell, 682.

The act of 1867 under discussion is violative of section 8, article xi, of the constitution, which provides:

"The Legislature shall have no power to suspend any "general law for the benefit of any particular individual, "nor to pass any law for the benefit of individuals, incon- "sistent with the general laws of the land; nor to pass "any law granting to any individual or individuals, rights, "privileges, immunities, or exemptions, other than such as "may be, by the same law, extended to any member of "the community who may be able to bring himself within "the provisions of such law."

It is clearly a suspension of the general law for the benefit of only the four counties named in the different acts.

The Legislature may suspend the operation of the general laws of the State, but where it does so the suspension must be general and cannot be made for individual cases or for *particular localities.*

Cooley's Constitutional Limitations, p. 490.

A law of the land is a rule embracing and affecting all persons in general, or all persons who exist and may come into like state, while a partial law embraces only a portion of those persons who exist in the same state and are surrounded by like circumstances.

3 Hump., 190.
2 Sneed, 121.
14 Lea, 523.

If we are correct in our understanding of the law as laid down in an "*unbroken series*" of decisions of the highest tribunal of the State of Tennessee, the proposition that the subscription was made and the bonds sued on herein were issued by usurping corporate officials, acting under an unconstitutional enactment of the legislature, has been fully maintained, and the county of Shelby is not in any manner bound for the payment thereof.

This is undoubtedly the law of Tennessee, and enforced by its courts.

The questions determined in these cases were purely "domestic" or "local"—cases not involving in the slightest degree any Federal matter, constitutional or statutory—involving nothing more than the construction of a statute passed in violation of the constitution of the State regulating the internal government of its civil institutions.

The right to determine such questions was never intended to be, and never has been, denied to the State authorities.

Storey, on the Constitution, 1392.
Aspinwall vs. County of Davis, 22 Howard.
Dartmouth College, 4 Wheat, 627.

There is no contrariety of opinion on this subject in Tennessee, but as the cases cited show, an absolute unanimity of opinion.

Will this court then adopt these State decisions as the law on the subject? At a very early day it was announced that in cases depending upon the constitution or statutes of a State this court would adopt the construction of the statutes or constitution given by the courts of the State when that construction could be ascertained.

Polk's Lessee vs. Wendell, 9 Crouch, 87.

The established doctrine in Nesmith vs. Sheldon, 7 Howard, 812, that the Supreme Court of the United States would adopt and follow the decision of the State courts in the construction of their own constitution and statutes when that construction has been settled by the decisions of its highest tribunals.

Walker vs. State Harbor Com'rs., 17 Wall, 648.
Elmwood vs. Marcy, 2 Otto, p. 294.

"Its interpretations are accepted as the true interpretation, whatever may be our opinion of its soundness."

Fairchild vs. County of Galloway, 100 U. S. Rep., p. 52.
Edmendorf vs. Taylor, 10 What., 152.
Green vs. Neal's Lessee, 6 Pel., 291.
Leffingwell vs. Warren, 2 Black, 549.
Sumner vs. Hicks, 532.
Olcott vs. Supervisor, 16 Wall, page 689.
State Railroad Cases, 92 U. S., 575.

"The same reasons that require that the final decision upon all questions of national jurisdiction should be left to the national courts will also hold the national courts bound to respect the decisions of the state courts upon all questions arising under the State constitution and laws where no question of national authority is in-

volved, and to accept those decisions as correct and follow them whenever the same questions arise in the national courts.

Cooley, Con. Lim., *13.
Judiciary Act of 1789.

"It is the settled rule of this court in such cases to follow the decisions of the State Courts."

1 Wallace, 206.
101 U. S., 686.
101 U. S., 676.
111 U. S., 406.
109 U. S., 104.
105 U. S., 71–294.
105 U. S., 667.

But it is said that there are many exceptions to this rule. Does this case come within the rule? The weight of authority in this court shows it does not. The question determined in the above cited cases of the state court did not involve the validity of any contract. Nothing more than the regulation of the organic law of a few of the counties of the State.

When the settled decisions of the highest court of a State have determined the extent and character of the powers which its political and municipal organizations shall possess, the decisions are authorative upon the courts of the United States.

Claiborne county vs. Brooks, 111 U. S., 406.

In such cases we submit with confidence this court will accept these decisions of the State court as the rule of law for its government here.

94 U. S., 267.
16 Wallace, 678.
92 U. S., 289.
95 U. S., 360.
100 U. S., 47.

II.

However, it is seriously contended by plaintiff in error that if the Board of Commission of defendant county was not a *de jure* court it was a *de facto* court, and hence the county is bound.

There must be a legal office in existence, which is being improperly held, to give to the acts of the incumbent the validity of an officer de facto.

Hildreth vs. McIntyre, 1 J. J. Marshall, p. 296, (Ky. Rep.)

Butterworth vs. Shelby County, Mss. 1871.

In the last named case the supreme court held that the President of said Board could not be a *de facto* officer, as there was no legal Board of which he could be President, and no vacancy in the legal organization.

It will be found upon an examination of the authorities cited by opposing counsel in which the courts have have recognized the acts of officers de facto as binding and valid, they were instances of illegally holding offices which had a legal existence, and not cases where the pretended officers were *usurpers*.

When there is no *legal* office, there can be no officer de facto.

Carlton vs. People, 10 Minn., p. 250.

The doctrine involved here is one of protection to the public and third persons on the ground of public policy, they not being required to inquire into or be compelled to show title in an officer. When, therefore, in civil cases the public or third persons have *knowledge* that the officer was not an officer *de jure*, the reason for validating the acts to which they submitted or which they invoked, failed and the law no longer protected them.

State vs. Carroll, 13 American Law Ret., p. 175.

Rex vs. Lile, Strange Rep., 1090.

Rex vs. Level, 6 East, 356.

Where the plaintiff in error appeared before the county court in October, 1871 (P. R., page 47), he knew, as a matter of fact, that the highest tribunal of Tennessee had decided the commissioners who issued the bonds in suit were *usurpers*, and that the act under which they held office was *unconstitutional* and *void*.

After this he purchased the bonds in suit. Can he now be heard to say that the commissioners were a *de facto* set of officers, when he had knowledge that the court of last resort had decided that they were not *de jure* officers? reason and authority say not.

The Board of Commissioners of defendant county were then neither *de jure* or a *de facto* court and possessed no power or authority to make the subscription and issue the bonds aforesaid.

The want of power in the Board of Commissioners to make the subscription and issue the bonds invalidated them in the hands of either the first taker or in those of a subsequent holder.

When county bonds to a railroad company are issued without authority they are invalid in the hands of an innocent purchaser. The authority to contract must exist before any protection as innocent purchaser can be claimed by the holder.

Marsh vs. Fulton Co., 10 Wallace, p. 676.
Township of Elmwood vs. Mary, 92 U. S. Rep., 289.
Harshman vs. Bates county, 92 U. S. Rep., 569.
Ottawa vs. Casey, 108 U. S., p. 111.
Lewis vs. City of Shreveport, 108 U. S., p. 283.

III

It is insisted on the part of the plaintiff in error that the county court, the rightful officials, on their return to power, on the 15th November, 1869, and thereon until the 5th May, 1870, when the new constitution went into effect,

ratified the act of the Board of Commissioners in making said subscription and issuing the bonds, and the defendant county is therefore bound.

The act of the legislature creating said Board of Commissioners having been declared unconstitutional and void by the highest tribunal of the State, as we have already shown, all the acts of this Board of Commission were, in law, absolute nullities.

"An unconstitutional statute stands as if it had never been. Rights can not be built up under it; contracts which depend upon it for their consideration are void. It constitutes a protection to no one acting under it, and is to be regarded as having never *at any time* been possessed of any legal force whatever.

Cols. Con. Lim. 187.

In the case of Aspinwall vs. Davis, 22 Howard, p. 364, the charter of the Ohio & Mississippi R. R. Company authorized the counties through which the road ran to take stock and issue bonds as payment.

This court held neither the charter nor the vote of the citizens in favor of a subscription constitute a *contract* with the company until the subscription is actually made by the *proper officers* of the county.

The Board of Commissioners of Shelby county were not the proper officers of the county to do any act or acts for it. Indeed they were not agents for the county in any sense or for any purpose.

The person or officer whose act or acts are the subject of ratification must have a legal existence and the semblance of legal authority at least, in order to predicate a ratification.

The fact is, Shelby county at the time of the making of this subscription and issuances of these bonds had no agent or agents. The justices of the peace composing the county court, the rightful corporate officials of this

county, had been displaced by a body of men claiming to be officers, but who were in law trespassers and usurpers.

The civil government of the county was practically without "form" These persons could do no valid act. They were agents for no one and for no purpose, and nothing they did can be the subject of ratification.

Corporate ratification cannot make a municipal bond valid which was void when issued, for want of power to make it.

The ratification of a public corporation of an act originally void is of no effect.

Howe vs. Helton, 27 Conn., 538.
People vs. Flagg, 17 N. Y., 584.
Mills vs. Gleason, 11 Wis., 470.
Blew vs. Bear River Co., 20 Cal., p. 602.
Burrell vs. Berton, 2 Cliff Ct. Ct., 490.
March vs. Fulton, 10 Wall, 677.
Lewis vs. Shreveport, 108 U. S., 282.
Ottawa vs. Carey, 108 U. S., 110.

It matters not whether the county levied tax to pay and did pay other bonds of this issue, or that it retained and voted the stock, etc. These things are of no avail to plaintiff in error if the want of authority existed in the beginning.

City of Ottawa vs. Carey, 108 U. S., 110.
Lewis vs. Shreveport, 108 U. S., 282.

At the time these supposed acts of ratification occurred, the cause of Walker, et. als., vs. Merriman, et. als., was pending in the State supreme court undetermined, and none of the cases referred to above as authority on this point had been decided, and the county court was ignorant of its rights and duty in the premises.

There was then nothing that the county court could ratify on their return to power, there had been no *legal* subscription and no *valid* issuance and execution of the

bonds, and therefore no *contract* upon which a ratification could rest.

Nothing short of a formal act equivalent to a legal subscription, made in accordance with the acts of the legislature, would be sufficient to give legal life and validity to a subscription and issuance of bonds *void ab initio.*

This could have been done by the county court, as the governing agency of Shelby county, under sec. 6 of chapter 47, acts of 1867, a majority of the justices in Commission assembled, concurring, prior to May 5, 1870, but it was not done.

And while an original subscription could have been made by the county court under the aforesaid act, up to the adoption of the new constitution, it could not, for want of legislative power, *ratify* a subscription made by persons not agents of the county, and acting without authority.

The power of ratification had not been bestowed by the legislature on the county court of Shelby county.

Municipal corporations possess only such powers as are expressly granted by the legislature, or that may be implied from such grant.

Ottowa vs. Carey, 108 U. S. p. 110.

The record, page 34, reveals the fact that the acts of ratification relied on were defectively performed, that is to say, a less number of the justices of the court voted for the levy of the tax than were required by the act of the legislature, to vote for the subscription and issuance of bonds, which, if held valid, would present the anomaly of *confirming* an act by an authority less potential than that required to perform the *original.*

Ratification is inoperative if the party attempted to be charged was not competent to make the contract in question when the same was made, nor when the supposed acts of ratification were performed, or if the contract was illegal, immoral or against public policy.

Schenk vs. Supervisors, 5 Wallace, 781.

The question in this case involved the ratification of a lawful act improperly performed. The defective execution of a power to issue, while here there was no power to issue. The bonds were *void ab initio* and there can be no ratification.

People vs. Flagg, 17 N. Y., 586.

The general doctrine is that a ratification can only be made when the principal at the time possesses the power to do the act ratified. He must be able at the time to make the contract to which, by his ratification, he gives validity.

McCracken vs. San Francisco, 16 Cal., 624.

A ratification being in effect upon the act of an agent, equivalent to the possession by him of a previous authority and operating upon the act ratified in the same manner as though the authority of the agent to do the act existed originally, can only be made when the party ratifying possesses the power to perform.

Marsh vs. Fulton county, 10 Wallace, 677.

Shelby county had no power through the Board of Commissioners, and the County Court only had power previous to the constitution of 1870 to subscribe the stock and issue the bonds, *a majority of the justices of the peace concurring.* No action of this character is shown by the record.

IV.

Such was the state of the case up to May 5, 1870, when the new constitution went into effect. Article 11, section 29, of said constitution inhibited and forbade the defendant from giving or loaning to or in aid of any person, company, association or corporation the credit of said county, and from becoming a stockholder with others in any company, association or corporation, except upon an election first held by the qualified voters of such county and the assent of three-fourths of the votes cast at said election. It is not pretended that this question was

ever submitted to a vote of the people of the county after the adoption of the constitution of 1870.

And further, it is not pretended that the county court, from the time it resumed control of the affairs of the county, viz., November, 1869, to May 5, 1870, made any subscription to said railroad and issued the bonds in aid thereto, as provided by acts of Legislature of Tennessee.

So we insist when the new constitution went into effect the *status quo* remained unchanged. There had been no legal subscription and issuance of bonds, and no corporate ratification sufficient to make a void act a binding one, if such a thing could be done, and there was no contract to be affected by the adoption of the new constitution, and in order to make the subscription the constitution had to be complied with.

The question then is narrowed down to this: Was the action of the court at its October term, 1871, relied on as an estoppel, such as was equivalent in law to submitting the matter, according to article 11, section 29, of the constitution of 1870, to a vote of the people of the county? If it was not, and the most liberal interpretation of its meaning and intent cannot support such a view, then what was done or transpired at said term does not operate as an estoppel on the defendant to show that the bonds were issued without authority and not binding on it, even in the hands of an innocent holder. The case of the Locomotive Works vs. County of Tipton, 13 Otto, relied on in support of the question of estoppel, presented an entirely different question. There the subscription was made and the bonds issued by the county court, the rightful agents of the county, and it was proper and legal for it to waive the fraud complained of, and confirm and ratify what had been done by its predecessors.

Here the subscription was made and bonds issued by persons not agents or representatives of the counties, but trespassers and usurpers.

There is no analogy between the cases.

The law will not sustain the ratification or attempted ratification of such acts, and that which cannot be the subject of ratification cannot be the basis of an estoppel.

Hayes vs. Holly Springs, 114 U. S., 120.

It is argued by opposing counsel that when the constitution of 1870 went into effect that the subscription had been made and the bonds issued, hence it was an executed contract, and the adoption of this constitution could have no bearing on it.

In the light of the authorities of the highest tribunal of the State, and which we confidently believe the court will follow, already cited by us, showing conclusively that the acts of said Board of Commissioners were wholly void, this proposition cannot be seriously entertained for a moment.

And again, the effort to hold the defendant on the so-called acts of ratification transpiring between the 15th day of November, 1869, and the 5th of May, 1870, will be as difficult as the first proposition, because there is as little foundation in law for one as the other, the principle being that an act done by one having no power and thereby void in law, no character of act or acts tending towards ratification can make it valid and binding.

This principle is fundamental, and if the foundation falls the entire superstructure reared upon it must fall with it.

This court, more than twenty-five years ago, handed down the law that must settle beyond question the result of this case in favor of defendant.

The charter of the Ohio & Mississippi Railroad Company, passed by the legislature of Indiana in 1848, and a supplement in 1849, authorized the County Commissioners of a county through which the road passed to subscribe for stock and issue bonds, provided a majority of the qualified voters of the county voted, on the 1st of March, 1849, that this

should be done. The election was held on the appointed day and a majority of the voters voted that this subscription should be made. But before the subscription was made, the State adopted a new constitution, which went into effect the 1st of November, 1851. One of the articles prohibited such subscriptions, unless paid in cash, and prohibited, also, a county from loaning its credit or borrowing money to pay such subscriptions.

In 1852 the County Commissioners of Davies county subscribed for stock in the railroad company and issued their bonds for the amount.

The provisions of the railroad charter authorizing the Commissioners to subscribe conferred a power upon a public corporation or civil institution of government which could be modified, changed, enlarged or restrained by the legislative authority, the charter not importing a contract within the meaning of a clause of the constitution prohibiting a State from passing a law impairing the obligation of contracts.

The mere vote to subscribe did not of itself form such a contract with the railroad company as would be protected by the 10th section of the 1st article of the constitution of the United States.

Until the subscription was actually made the contract was unexecuted. The bonds were issued in violation of the constitution of Indiana and are therefore void.

Aspinwall vs County of Davies, 22 Howard, 364.

The doctrine announced in this case was reaffirmed in Wadsworth vs. Supervisors, 102 U. S., 534.

V.

The consideration of the question of ratification and estoppel, invoked in aid of plaintiff in error, leads to a discussion of one that raises the point, was he a *bona fide* or innocent holder of the bonds and coupons in suit?

Up to the time of the issuance of the bonds, in March, 1869, the validity of the acts of 1867, creating the Board of Commissioners, had not been passed upon by the State court, and there had been no adjudication on the

subject by the highest tribunal of Tennessee, except that it had been decided by that court that the taxing power could not be delegated by the Legislature to any other than counties or incorporated towns and that taxation without representation was a violation of the cardinal principles of our government.

Marr vs. Enloe, 1 Yerger, 452.
State vs. Ross, 7 Yerger, 74.

This was one of the objectionable and fatal grounds to the validity of the act of 1867, creating the board, as declared in Pope vs. Pheifer. Supra.

These cases were declaratory of what the law of the State was on questions involving the same principles at the time of the issuance of these bonds and were as much a part of the statute as the words composing the statute itself.

The judicial construction of an enactment of the legislature is as much a part of it as the words of the act, and enters into and forms a part of all contracts made by virtue of its existence.

3 Wallace, 294.
16 Wallace, 679.
4 Wallace, 197.

The plaintiff purchased the bonds in suit after his appearance before the county court in October, 1871, when, it is asserted, the defendant made such assurances that it is now estopped to deny its liability thereon.

Record, p. 8.

When this occurred the cases of Pope vs. Phifer and other cases heretofore cited had been decided and forever settled the legal statutes of the officials issuing the bonds. And the plaintiff being fully informed and chargeable with the legal effect, became the owner of the bonds at at his peril.

These bonds are stamped in the face with the recital that they were issued by authority conferred by the act of 1867 upon the County Commissioners.

Record, p. 4.

An act at that time by the supreme court of the state decided to be unconstitutional and the persons holding office under it *usurpers*.

A purchaser under such circumstances cannot be an innocent holder.

Ottawa vs. Carey, 108 U. S., 124.

A purchaser who has notice of any defect or vice in the origin of bonds is chargeable with such notice and will not be upheld as an innocent holder.

County of Warren vs. Marcy, 7 Otto, 105.

The holder of bonds and coupons will not be permitted to recover judgment thereon when the recitals therein are sufficient to put him on enquiry.

Harshman vs. Bates county, 2 Otto, 575.

Even a *bona fide* holder is required to look to the sufficiency of recitals in bonds and the validity of legislative enactment under which they were issued, much less one buying bonds, as plaintiff did, issued under void authority and with knowledge of that fact.

103 U. S., 683.
104 U. S., 579.
102 U. S., 634.
94 U. S., 429.

We submit the errors assigned cannot be sustained, and the judgment of the court below should be affirmed.

R. D. JORDAN,
Of Counsel for Defendant.

APPENDIX A.

ACTS OF 1867 CREATING BOARD OF COMMISSIONERS.

SECTION 21. Be it further enacted, That there shall be established in the county of Shelby, in this State, a Board of County Commissioners, to consist of five persons, who, previous to their appointment or election, shall have been residents of said county not less than two years, each to serve for the period of five years and until his successor is elected and qualified, except only in case of appointment, as hereinafter provided, one of whom shall be elected by the qualified voters of said county on the first Saturday of March of each year, the first election to take place in the year A. D. eighteen hundred and sixty-eight, and annually thereafter, and until which elections shall take place the said commissioners shall be appointed by the governor of this State, who shall designate in the commissions to be issued to each member of said board the period at which their times of service shall successively expire, the first to hold from the date of his appointment until the election in March, A. D. one thousand, eight hundred and sixty-eight; the second until the election in March, one thousand, eight hundred and sixty-nine; the third until the election in March, one thousand, eight hundred and seventy; the fourth until the election in March, one thousand, eight hundred and seventy-one, and the fifth until the election in March, one thousand, eight hundred and seventy-two. The last named to be commissioned as president of said board and to hold his office as such until the term of his office as commissioner shall expire, after which each member of said board shall be the president thereof, from the commencement until the close of the last year of his term of service.

Sec. 25. Be it further enacted, That all the powers and duties which are now vested in and performed by the quarterly court of said county shall be vested in the said Board of Commissioners, and in addition to the powers now conferred by law the said board shall have authority to insure the public buildings and other property of the county; to order and contract for surveys and maps of the county; to provide for payment of expenses and furnishing court rooms; to establish grades; to purchase record book and all necessary stationery for their own use, as a board, and for the clerk's offices and other courts in the county; to provide for the compensation and expense of jurors as fixed by law; to appoint an attorney for the county, whose duty it shall be to prosecute and defend all suits in behalf of the county, advise said commissioners upon all legal questions, to inspect and examine all bonds of other officers of the county, prepare forms for blanks to be used by said commissioners, attend generally to the interest of the county and all other matters properly within the sphere of his duties which may be required of him by said board; to appropriate money for their own and the salaries of other officers of the county; to provide such additional compensation to the salaries of the judges of the courts of Memphis as may be just and reasonable; to subscribe stock in railroads which the county court of Shelby county has been authorized, by general and special law, to subscribe, and under the same conditions and restrictions, and to represent such stock in all elections for directors and provide for payment of subscriptions made; to fix the salary of the probate judge, and to make all necessary appropriations to carry out the above powers. No money shall be drawn from the treasury except upon a warrant signed by the president of said Board of Commissioners and countersigned by the county clerk, and said Commissioners are hereby vested with all powers which, by the code of Tennessee, have heretofore been vested in the county court in the following sections of the

code of the State, viz., 4206, 4207, 4211, 4212, 4213, 4214 and 4215.

APPENDIX B.

AN ACT for the benefit of the Winchester & Alabama Railroad Company, and for other purposes.

* * * * * * * * * * *

Sec. 6. Be it further enacted, That the county court of any county through which the line of the Mississippi River Railroad is proposed to run, a majority of the justices in commission at the time concurring, may make a corporate or county subscription to the capital stock of said railroad company, of an amount not exceeding two-thirds of the estimated cost of grading the road-bed through the county and preparing the same for the iron rails; the said cost to be verified by the sworn statement of the president or chief engineer of said company. And after such subscription shall have been entered upon the books of the railroad company, either by the chairman of the county court, or by any other member of the court appointed therefor, the court shall proceed, without further reference or delay, to levy an assessment on all the taxable property within the county, sufficient to pay said subscription; and the same shall be payable in three equal annual installments, commencing with the fiscal year in which said subscription shall be made. And it shall be lawful for county courts making subscriptions as herein provided, to issue short bonds to the railroad company, in anticipation of the collection of the annual levies, if thereby construction of the work may be facilitated; and in all other respects, except as herein specially provided, the capital stock of said railroad company to be subscribed by counties, shall be governed by the general internal improvement laws of the State.

APPENDIX C.

CHAPTER XLV.—ACTS OF 1868–69.

* * * * * * * * * * *

Sec. 28. Be it further enacted, That the stock authorized to be subscribed in the Mississippi Railroad Company by the county courts or county commissioners of the counties along the line of said railroad, may be payable in not exceeding six annual installments, instead of three, as now provided by law.

* * * * * * * * * * *

Passed February 12, 1869.

APPENDIX D.

CONSTITUTION OF 1796.

ARTICLE VI.

SECTION 1. There shall be appointed in each county, by the *county court*, one sheriff, one coroner, one trustee, and a sufficient number of constables, who shall hold their offices for two years. They shall also have power to appoint one register and ranger for the county, who shall hold their offices during good behavior. The sheriff and coroner shall be commissioned by the governor.

Sec. 2. There shall be a treasurer or treasurers appointed for the State, who shall hold his or their offices for two years.

Sec. 3. The appointment of all officers not otherwise directed by this constitution, shall be vested in the Legislature.

APPENDIX E.

CONSTITUTION OF 1834.

ARTICLE VI.

Judicial Department.

SECTION 1. The judicial power of this State shall be vested in one supreme court; in such inferior courts as the Legislature shall, from time to time, ordain and establish, and the judges thereof; and in justices of the peace. The Legislature may also vest in such jurisdiction as may be deemed necessary in corporation courts.

ARTICLE VII.

State and County Officers.

SECTION 1. There shall be elected in each county, by the qualified voters therein, one sheriff, one trustee, and one register; the sheriff and trustee for two years, and the register for four years: *Provided*, that no person shall be eligible to the office of sheriff more than six years in any term of eight years. There shall be elected for each county, by the *justices of the peace*, one coroner, and one ranger, who shall hold their offices for two years. Said officers shall be removed for malfeasance, or neglect of duty, in such manner as may be subscribed by law.

Sec. 2. Should a vacancy occur, subsequent to an election, in the office of sheriff, trustee, or register, it shall be filled by the *justices;* if in that of the clerk's to be elected by the people, it shall be filled by the courts; and the person so appointed shall continue in office until his successor shall be elected and qualified; and such office shall be filled by the qualified voters at the first election for any of the county officers.

ARTICLE XI.

SECTION. 7. "The legislature has no power to suspend "any general law for the benefit of any particular individ-

"ual, nor to pass any law for the benefit of individuals, in-
"consistent with the general laws of the land; nor to pass
"any law granting to any individuals rights, immunities
"or exemptions other than as may be by the same law ex-
"tended to any member of the community who may be
"able to bring himself within the provisions of such law;
"provided, always, the legislature shall have power to grant
"such charters of incorporation as they may deem expe-
"dient for the public good."

ARTICLE II.

SEC. 29. "The general Assembly shall have power to
"authorize the several counties and incorporated towns in
"this State to impose taxes for county and corporation
"purposes in such manner as shall be prescribed by law,
"and all property shall be taxed according to its value,
"upon the principles established in regard to State Taxa-
"tion."

APPENDIX F.

CONSTITUTION, 1870.

ARTICLE II.

SECTION 29. The General Assembly shall have power to authorize the several counties and incorporated towns in this State, to impose taxes for county and corporation purposes respectively, in such manner as shall be prescribed by law; and all property shall be taxed according to its value, upon the principles established in regard to State taxation. But the credit of no county, city or town shall be given or loaned to or in aid of any person, company, association or corporation, except upon an election to be first held by the qualified voters of such county, city or town, and the assent of three-fourths of the votes cast at said election.

FILED.
MAR 25 1886
JAMES H. McKENNEY.
CLERK.

118-425

No. 194

In United States Supreme Court.

EXTEIN NORTON, PLAINTIFF IN ERROR,

vs. } *In Error from the Circuit Court of the United States for the Western District of Tennessee, at Memphis.*

SHELBY COUNTY, DEFENDANT IN ERROR.

ADDITIONAL BRIEF AND ARGUMENT

FOR DEFENDANT IN ERROR.

ROTHROCK PR., 1001 F ST.

IN THE

Supreme Court of the United States.

EXSTEIN NORTON, *Plaintiff in Error*, vs. SHELBY COUNTY, STATE OF TENNESSEE, *Defendant in Error.*	No. 194, October Term, 1885.

ADDITIONAL BRIEF FOR DEFENDANT IN ERROR.

We beg leave to submit the following brief in reply to that of Mr. Joseph H. Choate, counsel for plaintiff in error.

We deny that the plaintiff in error is a *bona fide* holder of the bonds here sued on.

At the time of purchasing them he had full knowledge that their validity was disputed, and of the facts and circumstances under which they were issued. (Record pp. 71, 72 and 73.)

We deny that the legislative authority was conferred by the act of Feb. 25, 1867, upon the county of Shelby. That statute confers it upon the county court, a majority of the justices in commission concurring.

We deny that after the passage of the act of March 9, 1867, the commissioners thereby created, organized, and held the regular terms of the county court. They never professed to hold the county court but merely as the board of county commissioners of Shelby county, and professed to act in that capacity as provided by the act in question. (Record, pp. 20, 25, 26, 27, 29, and 65.)

We deny that at the regular January term of the quarterly court of the county the commissioners subscribed for the stock. No January term of the quarterly court was held.

The term at which the subscription was made was the January term of the board of commissioners of Shelby county. (Record, pp. 20 and 25.)

We deny as stated on p. 4 of the brief of the adversary counsel that "*they (the Commissioners) took up and continued the business of the court at the point where it had been left by the retiring commissioners.*"

There were no "retiring commissioners."

The act was intended to, and if it had been valid would have abolished the county court and substituted in its place a new governing agency for the county of Shelby.

This governing agency professed to act as the board of county commissioners and under the act creating it, and in no sense as a quarterly court.

We deny that after the adoption of the constitution of 1870 the county court uniformly treated the issue of bonds as the genuine and legal obligations of the county of Shelby.

Their validity was frequently called in question by the county court as is abundantly shown by the record.

In answer to the proposition stated on p. 7 of the brief, in reference to the decision of Pope *vs.* Phifer, we say that suits are decided upon the cause of action existing

at their inception, and this was done in the case referred to, and in every other case in Tennessee involving the constitutionality of the act of 1867.

On p. 8 of the brief the learned counsel in commenting upon the decision of the Supreme Court of Tennessee in the County Court *vs.* Butterworth, says: "The issuing of the tax-warrant was the exercise of the taxing power of the county, which had been held in Pope *vs.* Phifer, to vest in the justices of the peace of the county the power to hold the quarterly court of the county as the county legislature, and as vested in them under the constitution of 1834."

Yet on page 25 of the brief the counsel says, referring to the power to issue the bonds now in dispute, it was not a power involving the taxing power.

How can both these propositions be true? The only mode of paying the warrants sued on in Butterworth's case was through the levy of a tax. The only mode by which the bonds in suit can be paid is the levy of a tax.

It seems to us that the taxing power was involved equally in the issuance of the warrants and the making of the subscription and issuing of the bonds.

The counsel has, on page 10 of the brief, set out at length from the record, page 41, the action of the quarterly court adopting the assessment made by the board of commissioners for the years 1867, 1868, and 1869, and argues that this was an express ratification of the acts of the commissioners during their term of office in respect to taxation, treating them as acts done on the part of the county by improper agents.

It will be observed that the adoption was only the taxation fixed for State and county purposes.

On page 30 of the record the following appears as the action of the county commissioners: "On motion,

twenty (20) cents was fixed as the rate of taxation on each one hundred dollars of real or personal property on account of the Mississippi River Railroad bonds."

This was not the fixing of the rate of taxation for State and county purposes, but fixing a rate of taxation on account of the Mississippi River Railroad bonds, which was, under Tennessee law, a special tax.

State and county taxes being general taxes for State and county purposes, a railroad tax being a special tax.

Therefore we insist that instead of the order recited being a ratification of this railroad tax it is a repudiation of it, upon the principle *expressio unius exeluvio alterivs.*

Besides, the order relied upon was adopted on the 10th day of October, 1871, when the constitution of 1870 was in full vigor, and which took from the county court the power to make subscriptions without a vote of the people.

Certainly if the court had no power in 1871 to make an original subscription without a vote of the people, it could not ratify and make binding a subscription void in the first instance, even conceding for the argument that there was legislative authority for the county without such vote of the people.

It is evident that the county court did not intend by the order of October 11th, 1871, to adopt any tax for the Mississippi River Railroad. 1st. From the preamble of the order which recites that "whereas the assessment for *State and county purposes*, made by the late so-called commissioners," etc. And again, on page 39 of the record, the county court by order of July 7th, 1871, set aside and vacated a tax which it had levied for this railroad on April 12th, 1871, upon the ground, as the order states, "that the tax was levied under a misapprehension, or without a knowledge of the law in the case, and be-

cause the Supreme Court had lately decided that the acts of Barbour Lewis, as president of the board of county commissioners of Shelby County, were unauthorized and void, and because said bonds were issued by said Barbour Lewis, as president, etc., without the consent of the county court, had and obtained according to law."

While we concede the proposition (*a*) set out on the bottom of page 13 and on page 14, that an act may be constitutional in part and unconstitutional as to the rest, yet we deny that section 25 of the act of 1867 complained of is such a one. 1st. Because it is not separable, and if it were it would be unconstitutional, because it is a special law, and falls under the ban of the second proposition established in the case of Pope *vs.* Phifer, its operation being confined to a single county. Constitution of Tennessee 1834, sec. 8, art. 11.

The decision in Pointdexter *vs.* Greenhow, 114 United States, page 271, cited by the learned counsel, is an authority for the defendant.

In that case this court held the acts of Virginia unconstitutional, because they constituted a *general scheme* to impair the obligation of the previous contract of the State.

The act here complained of shows a *scheme to abolish the quarterly court, and to erect in its stead a new governing agency for the county of Shelby not authorized by the constitution of* 1834.

The argument embodied in (*c*), pages 18 and 19 of the brief, could not avail the plaintiff if it were sound, because his right to recover here rests in the power conferred upon the county commissioners "*to subscribe stock in railroads*," for the power conferred upon a mu-

nicipality to make a subscription necessarily carries with it the power of taxation.

Ralls County Court *vs.* The United States, 105 U. S., pp. 735 and 736.

Loan Association *vs.* Topeka, 20 Wallace, 98 U. S., p. 381.

The power to levy a tax for counties was resident in the quarterly courts, and could not be taken from them and conferred on local tribunals of particular counties composed of commissioners appointed by the governer. Pope *vs.* Phifer, 3d Heiskell, p. 683.

We do contend that the legislature could not have created a board of county commissioners and have conferred upon it the power to make a subscription, such power necessarily, in the absence of a negative provision, embraced the power to levy a tax, and this could only be done by the quarterly court.

In answer to the argument upon p. 20 of the brief we concede that such powers as were vested in the county court *purely of a statutary nature*, the legislature might withdraw from it and vest in another tribunal, but we say that in order for such an enactment to be a valid one it *must not be special legislation but a general law*, applying to all the counties in the state. (Constitution of 1834, section 8, article 11.)

If we understand the doctrine enunciated in the cases of Phifer and Butterworth, it refutes the argument of the learned counsel embodied in (*a*) p. 21 of the brief.

On p. 22 of the brief the learned counsel says: "By the nineteenth section, alluding to the act of March 12, 1868, which created the board of commissioners for the county of Madison the quorum courts of the counties to which the act related are abolished and all their powers

and jurisdiction are vested in the board of commissioners."

There is no such provision as this in the act of March 9, 1867, which applied to the county of Shelby.

The argument on p. 33 is made notwithstanding section 48 of the act of 1867 which in *express terms repealed all other acts in conflict with it.*

The learned counsel on p. 22 insists that the question now presented was not considered or in any way referred to by the Tennessee supreme court in the case of Pope *vs.* Phifer, but the very question was determined adversely to his contention in the Butterworth case. (See appendix to brief of W. B. Glisson.)

We submit that the learned counsel misapprehends the decision in Pope *vs.* Phifer. It did not turn upon the question of the power of the legislature to organize the county court by transferring its powers and duties from the justices of the peace of the county to whom they were secured by the constitution to a board of commissioners appointed by the Governor.

The decision was that the legislature could not abolish the county court and erect such a tribunal as he has stated possessing the powers of that court. (See the extensive quotations from that case upon pp. 24 and 25 of the brief.)

On page 26 of the brief it is said: "The power to subscribe to the stock of a railroad and to issue bonds therefor was certainly not one of the constitutional functions of the county court."

We have seen that the power to subscribe carried with it the power to tax. The Tennessee supreme court in Phifer's case held that the taxing power must be exercised by the county court. But the power to levy a tax to pay the subscription was not left to implication

by the act of 1867, for it expressly provides "that the board of commissioners shall have power to subscribe stock in railroads which the county court of Shelby county had been authorized by general and special laws to subscribe and under the same conditions and restrictions and to represent such stock in all elections for directors *and provide for payment of subscriptions as made.*"

The means which municipal corporations have to provide for payment of subscriptions is by the exercise of the taxing power. (Claborne County *vs.* Brohks, 111 U. S., pp. 406, 407,) and especially the extract from the case set out in the brief of Mr. Choate, p. 27.

It occurs to us that the argument of learned counsel on pp. 27 and 28 is *felo de se.*

Confessedly the power to issue bonds carried with it the power of taxation, which latter power by an unbroken line of decisions of the highest court of Tennessee is held to be resident in the quarterly court, and incapable of being withdrawn by the legislature from that court and conferred upon any other tribunal.

We deny under authority of the cases from Tennessee the proposition of the learned gentleman that the legislature of Tennessee might have originally vested the power to subscribe for railroad stock and issue bonds therefor on the part of the county in commissioners designated by it for the purpose, or after having vested it in the county court could withdraw that power and confer it upon any other tribunal.

On page 32 of the brief the learned counsel says: "Upon appeal to the court of chancery they were adjudged by the chancellor to be legally in office. They were sustained therein by the State authorities."

It will be perceived by reference to section 17 of the act that it was provided that no injunction should be

granted by any judge or court in this state upon any bill alleging or involving the unconstitutionality of the act. It was under this provision that the chancellor dismissed the bill. Immediately an appeal was prosecuted which pended in the supreme court and was finally decided in favor of the justices.

There was never a decision of any court sustaining the board of county commissioners or the constitutionality of the law.

The case of McLean *vs.* the State, 8 Heiskell, page 235, relied upon by the counsel for the plaintiff was a motion made by the State and county against McLean and the securities on his official bond.

The defense was urged by the sureties that the taxes collected by him having been levied by the board of county commissioners, and his official bond approved by them, there could not be a recovery.

The supreme court of Tennessee held that McLean having received the money as State and county revenue, and having been properly elected by the people, and executed a bond, he and his securities were estopped to deny that the money collected by him was State and county revenue.

Especially was this so in Tennessee where the statute upon the subject of official bonds is intended to cure and did cure, as there held every defect in them.

In the case alluded to the doctrine of Pope against Phifer was not doubted, but expressly approved.

If it were true as contended that the effect of the act of March 9, 1867, was only to substitute commissioners for the justices of the peace and not to disturb the court otherwise, which we deny, the authorities cited by the gentlemen upon the doctrine of officers *de facto* would be

applicable to this case, if the act was not unconstitutional as being a partial law.

If, as contended by the learned counsel, the effect of the act was only to substitute five commissioners in place of the justices of the peace in the county court, we confidently submit that it would be partial legislation violative of the section of the constitution of 1884 prohibiting such, and void, as held in the case of Pope *vs.* Phifer on this ground.

We concede that where any office exists, so far as third persons and the public are concerned, the actions of the incumbent are those of an officer *de facto*.

The point we make here, and upon which we confidently rely, is that there can be no officer *de facto* without an office *de jure*.

On page 46 of the brief it is argued by the counsel that both officer and office may be *de facto*, and yet the act of the officer be valid, and in support of this proposition he cites the opinion of Judge Deady In Re Ah Lee, 5th Federal Reporter, 899.

Instead of sustaining the contention of the counsel it is an authority against him.

In that case the facts were that the office of circuit judge was created by the constitution of the State, but required both this office and that of supreme judge to be filled by the same person, until the legislature in the exercise of the power conferred upon it provided for the election of district judges.

The third objection made was "that a person cannot be considered an officer *de facto* unless the office he has is said to be in legal existence, and there being no such office as circuit judge or judge of the circuit court established by the constitution, the person who acted as judge

in the trial of the petitioner in the court was not a *de facto* judge." Page 908.

But the learned judge in disposing of this objection said: "As to the third point, it is sufficient to say that the constitution in effect creates a circuit court in each county, to be held by a justice of the Supreme Court, or a circuit judge, as the case may be, and such court is the office of the judge who holds it."

"A circuit judge's office is the court in which he sits, the place which he fills, and such is the place or office filled by the person who acted as judge upon the trial of the petitioner." Page 909.

In Carlton *vs.* The People, 10th Michigan, page 251, the question was when the office of supervisor was created. An act of the legislature, approved February 4th, 1859, was enacted, organizing the county of Muskegon from territory which at the time was included in the territory of Oceana and Ottawa counties, and within this territory was the township of Oceana, then a duly organized township.

"The act provided that at the annual township election to be held in April next the proper officers for the county should be elected, but on account of a constitutional provision this act did not take effect until the expiration of 90 days from the end of the session.

An election was held in April, though the act did not go into operation until about May 16.

The court held that: "In the new county there were several organized townships (*of which Oceana was one*) and from time the act took effect they became organized townships of said county and their supervisors thenceforward were supervisors of such county."

"These supervisors were not elected under the act organizing Muskegon county, nor did they derive from

that act their powers, nor were their duties imposed by it. Such powers and duties spring from the general law regulating the election powers and duties of such officers." (P. 254.)

And the conviction of Carlton was affirmed on the ground that he was the incumbent of an office in a township already organized.

But Campbell Judge Christiancy, J., concurring declared: "There could not be an office *de facto* where no officer *de jure* was provided for." (P. 258.) A proposition to our mind axiomatic, and which we think no case can be produced to deny.

The doctrine we contend for on this point is declared by the court of Tennessee in the case of Butterworth.

We concede the doctrine to be clearly established by this court that where power exists in the municipality or its representatives to make a railroad subscription, and this power has been executed defectively, or its execution procured by fraud the subscription may subsequently be ratified.

But we insist that where no power to make the subscription exists ratification cannot be had except by legislative authority, and if there be a prohibition, such as is contained in the constitution of 1870, no ratification can be had except when authorized by a proper vote of the people.

No act of the quarterly court subsequent to May 5, 1870, could amount to a ratification of these bonds, for since then that court has had no power to make a subscription except upon a proper vote of the people, and clearly if it had no power to make the subscription in the first instance it could not validate a void subscription by ratification, and this is clearly held in McCraken against the city of San Francisco, 16 California, 524,

624. Messrs. Poston, of counsel for plaintiff, on page 40 of their brief quote thus from the opinion of Mr. Justice Field in that case: "It follows also from the general doctrine that a ratification can only be made when the principal possesses at the time the power to do the act ratified.

"He must be able at the time to make the contract to which by his ratification he gives validity," and this is the doctrine established by this court in all its decisions on that subject, as well as by the court of Tennessee. (Grenada *vs.* Brogden, 112 U. S., pages 271, 272.)

Under the general improvement law of 1852 all subscriptions to railroads were required to be authorized by vote of the people.

The act of the 25th of February, 1867, while in derogation of the general law has been held by this court and the supreme court of Tennessee to to be valid. But being in derogation of the general law it must be strictly construed.

It in express terms requires the subscription to be made by the county court, *a majority of the justices of the peace in commission concurring. It required this number to make the subscription originally and surely a less number could not ratify a defective subscription.*

The only act done by the quarterly court prior to the adoption of the constitution of 1870, which can be tortured into an act of ratification, was that of April 10, 1870, levying a tax for Mississippi river railroad bonds, which was on the 16th of April, 1870, ordered to be collected in cash. (Record, pages 33 and 34.)

When the first action was had there were twenty-two justices present, of which eighteen voted for the tax. When the second action was taken there were but twelve justices present, and as we have before seen there were

at that time forty-six justices in commission in Shelby county. So on neither occasion was there a majority of justices present much less a majority of justices concurring in the levy of the tax.

We insist that with the justices of the peace present in the quarterly court on either April 10, or April 16, 1870, as disclosed by the record, if the court had then attempted action for the first time under the act of 1867, and had made the subsequent issue of bonds their action would have been a nullity, for the reason before stated that on neither occasion was there a majority of the justices in commission present, much less a majority concurring.

On page 58 the counsel supposes a case, which, if it was supported by the facts, we concede would entitle him to a reversal of the judgement, because at the time supposed there was no constitutional prohibition upon the county court; after May 5th, 1870, there was.

We concede that if the county court had, prior to May 5th, 1870, attempted to make a subscription under the act of 1867, which was defectively done, or if its action had been procured by fraud, the subscription could have been subsequently ratified by the court, notwithstanding the constitutional prohibition, and this is the doctrine of the Locomotive Works *vs.* Tipton County, 103 U. S., p. 537.

What we insist here is, that there was no defective execution of the power, but the subscription was made by usurpers, which had never been ratified by the quarterly court until it was shorn of its powers by the constitution of 1870.

It was not a defect or irregularity in the issue of the bonds in the first instance, but it was a case of the total want of power upon the part of persons who made the

subscription and issued the bonds. No estoppel can supply the lack of power in the first instance, and this is the unbroken doctrine of all the cases in this court on the subject.

We submit that the Tipton county case is an authority for the defendant. There the subscription was made by the constitutional tribunal authorized to act for the county. True, this action was procured by fraud; subsequently there was a complete ratification.

Here the subscription was made by usurpers. There was a total want of power in them. Before any act of ratification was done the power of the county court was withdrawn by constitutional provision, except when authorized by a vote of three-fourths of the people.

On page 72 the counsel for the plaintiff submits that the case of Pope *vs.* Phifer is not entitled to the slightest consideration of this court.

We as confidently submit that it is but one link in an unbroken chain of decisions branding as unconstitutional such legislation as the act of 1867, and that as an interpretation of the State constitution by the highest court of that State it will be followed by this court.

In the case of Claiborne County *vs.* Brooks, 111 U. S., page 400, which was a case coming to this court from Tennessee, it was said, "where the settled decisions of the highest court of a State have determined the extent and character of the powers which its political and municipal organizations shall possess, the decisions are authoritative upon the courts of the United States. But in the absence of State statutes or settled decisions of the highest court of a State, the rule of interpretation in respect to the powers of political and municipal corporations is to be found in the analogies in their country of common origin, varied and modified by circumstances

peculiar to our political and social condition, and this is the uniform holding of this court.

The cases cited by counsel as in conflict with Pope *vs.* Phifer and Butterworth's case do not conflict with them.

Halsey *vs.* Gaines, 2nd B. J. Lea, 309, was an action brought by a circuit judge, whose court had been abolished during his constitutional term, to recover from the State salary after the abolishment of his court. Halsey was judge of one of two circuit courts of the county.

The Supreme court held that the act abolishing the court in question was valid, and that the legislature under the constitution could increase or diminish the number of circuit courts, so long as it did not impair the circuit court system and retained in the territory a circuit court.

That the act abolishing the circuit court necessarily destroyed the office of circuit judge, as there could be no officer without an office.

The case in nowise militates against the doctrine of the cases of Phifer and Butterworth, but recognizes its soundness, and is an authority for the defendant.

We submit that there was no error in the instruction of the trial judge, and the judgment should be affirmed.

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